Petition

81-1140

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Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

EAST COAST TENDER SERVICE, INC.,

Petitioner,

against

WILLIAM H. DUTY, JR., and RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS COMPANY and TIDEWATER CONSTRUCTION CORPORATION, a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. In a third party action brought by a harbor worker pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, is evidence of a violation of an administrative regulation by the non-employer defendant to be judged against a negligence *per se* standard, an evidence of negligence standard, or does the standard vary with the nature of the regulation involved and the circumstances of each case? Under what standard is the violated licensing regulation in this matter to be judged?

2. What is the requisite degree of specificity required for an objection to a jury charge to comply with Rule 51, Federal Rules of Civil Procedure?

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No. .....

IN THE

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OCTOBER TERM, 1981

EAST COAST TENDER SERVICE, INC.,

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against

WILLIAM H. DUTY, JR., and RAYMOND INTERNATIONAL, INC. and PETER KIEWIT SONS COMPANY and TIDEWATER CONSTRUCTION CORPORATION, a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, East Coast Tender Service, Inc., respectfully prays that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Fourth Circuit dated September 1, 1981, vacating the judgment and opinion of a panel of that Court dated January 23, 1981. The *en banc* decision reversed the judgment of the United States District Court for the District of Maryland.

Opinions Below

Both the panel opinion and the *en banc* opinion, printed in the appendix herein, are reported in 660 F.2d beginning at page 933. The panel opinion commences on page 934 and the *en banc* reversal of the panel begins at page 946.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit, *en banc,* was entered on September 1, 1981. On November 30, 1981, an Order was entered by the Honorable Warren Burger, C.J., extending the time for petitioner's filing of this petition until December 15, 1981. This petition was filed by that date. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Statutes and Rules Involved

Involved in this case is the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, 905(b) (LHWCA), and Rule 51, Federal Rules of Civil Procedure. Both the relevant part of the Statute and Rule are set forth as follows:

33 U.S.C. 905

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of

persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of unseaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Statement of the Case

This action arose out of an alleged accident occurring on April 26, 1976, on a partially constructed platform, in navigable waters of the Chesapeake Bay off Cove Point, Maryland. Plaintiff, William H. Duty, Jr., was an employee of Raymond-Kiewitt-Tidewater (RKT), the contractor in charge of constructing a liquified natural gas facility. The defendant, East Coast Tender Service, Inc., (East Coast), provided, *inter alia*, support services including the ferrying of men and equipment to the various construction sites.

Duty contended that he was injured when the crew boat CHANDELEUR, belonging to East Coast struck a platform as it was docking to pick up RKT employees. He stated that he was standing upon a ladder attached to the platform at the time of the collision and was thrown up in the air upon impact. His injuries allegedly resulted from this event.

Duty filed a complaint against East Coast on April 13, 1977, and the case proceeded to trial before a judge and a jury in the United States District Court for the District of Maryland commencing on June 12, 1979.

The crux of Duty's claim at trial against East Coast was twofold: that the operator of the crew boat CHANDELEUR, Douglas Kohlhoff, did not possess the requisite licensing by the Coast Guard; and that the CHANDELEUR with Kohlhoff at the helm, improperly approached the platform. It was stipulated that Kohlhoff was unlicensed. Proofs as to the allegedly improper approach came from an expert, Robert C. Whitfield.

Whitfield testified the stern-to approach utilized by Kohlhoff on the date of the accident, considering all the circumstances, was improper. Whitfield, who also was not licensed as an operator by the Coast Guard and whose expertise came from being a member of the Power Squadron, the Coast Guard Auxiliary and from reading a few texts on boating, admitted, however, that the possession of a Coast Guard license itself made no difference in following the proper docking procedure.

Kohlhoff testified that the stern-to approach was sound and proper. This evidence came from a witness who was a union deckhand since 1970 and who had frequently been called upon to operate the vessel, in and out of the presence of the regularly licensed operator, Robert Jarvis. Kohlhoff

had been working aboard the CHANDELEUR for nine to ten months prior to the alleged accident, during which time, on an average working day, he made 65 to 70 runs picking up or unloading work crews. This experience, together with private study, gave him a sound working knowledge of boats and navigation.

Whether this accident occurred at all was very much in dispute at the trial. East Coast's deck logs, which are required to note all unusual occurrences, including personal injury or property damage, contained no entry either for injury to Duty or for damage to the platform. RKT never filed a claim for damage to their platform and East Coast was never informed of Duty's alleged accident and injuries until served with the Summons and Complaint. Discrepancies in Duty's testimony and behavior further cast doubt upon the truthfulness of his claim. For example, he told one physician, his original treating doctor, that he had been shaken on a ladder but told a second physician that he was thrown ten feet in the air. More dramatically, throughout the pretrial proceedings, Duty was hardly mobile, only able to walk with the aid of two hand crutches, or sometimes a cane. This behavior continued until films, secretly taken of him, revealed him performing heavy labor, building an addition to his home on Kent Island in Chesapeake Bay.

The trial jury was confronted with sharply conflicting evidence on every important issue: the happening of any accident in the first place; the existence of any injuries whatsoever; the existence of any negligence; and, the causal relationship between the negligence and the accident. After a seven day trial, a general verdict for the defendant was returned on June 20, 1979.

Plaintiff filed an appeal contending that his chance for a verdict was lost because the District Court erroneously

charged the jury on one element of negligence. No other error was claimed. Plaintiff had requested that the jury be charged that the fact that Kohlhoff was not a Coast Guard licensed operator was "negligence *per se*." The Court refused and charged that Kohlhoff's lack of a license should be considered as "evidence of negligence" only. He argued that the District Court erred by charging the land-based Maryland law that a violation of a statute or regulation could only be evidence of negligence and not negligence *per se*. Plaintiff argued that maritime and not land-based law controls and that law requires a negligence *per se* instruction.

A panel of the Fourth Circuit Court of Appeals affirmed, 2-1, without reaching the substantive questions. In an opinion filed on January 23, 1981 the majority found that counsel for Duty failed, in his objection to the charge, to abide by the requirements of Rule 51, Federal Rules of Civil Procedure, by not stating with specificity the grounds for his objection to the charge. The dissent did reach the substantive grounds, agreeing with the appellant that general maritime rather than land-based law applied and that law required a negligence *per se* charge.

Application was made for a hearing *en banc*, which was granted. After further oral argument a sharply divided Court of Appeals issued an opinion on September 1, 1981 adopting the panel dissent and, thus, reversing the jury verdict.

REASONS FOR GRANTING THE WRIT

A.

There Is a Split of Authority as to Whether or When a Negligence *Per Se* Standard, or an Evidence of Negligence Standard Is to Apply to the Violation of an Administrative Regulation by a Defendant in an Action Under 33 U.S.C. 905.

In its enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, Congress intended to eliminate special maritime considerations in an action by an injured longshoreman or harbor worker. This is the latest in a series of cases in which the principles of negligence to be applied in LHWCA third-party cases is in issue. If for no other reason, certiorari should be granted in this case to establish the standard of negligence to be applied in LHWCA cases involving governmental regulations, particularly in light of the extent of regulations that apply in these cases.

As the Court noted in its recent opinion in *Scindia Steam Navigation Co.* v. *DeLos Santos,* —— U.S. ——, 68 L.Ed.2d 1, 101 S.Ct. 1614 (1981) the purpose of the amendments "was to place the injured longshoreman 'in the same position he would be if he were injured in non maritime employment ashore . . . and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'non-delegable duty' or the like." S. Rep. No. 92-1125 (1972) . . . p. 10. *Id.* at n.13.

There was to be a Federal law comprising those land-based standards pursuant to which the injured longshoreman or harbor worker would bring his action. *Id.* Thus his rights would not depend upon the law of the forum in which

the action was brought. 1972 U.S. Code Cong. and Adm. News at 4705.*

As this Court noted in *Scindia*, however, Congress provided little guidance, if any, for determining which acts or omissions could be deemed negligent under this new general federal maritime law nor as to the applicability of various tort doctrines. This was left to be "resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties." *Scindia, supra,* at n.13.

The development of this new body of Federal tort law, not dependent upon the common law of the various states, has caused a great deal of confusion as to just what is the applicable law, and on several occasions this Court has had to resolve the resultant disputes. Thus, it was after the development of substantial conflict between courts of appeals as to the relative duties of stevedore companies and vessels to an injured longshoreman that this Court issued its decision in *Scindia* clarifying those duties and, thus, clarifying the general Federal maritime tort law with regard to those duties. So too, conflict has developed between and within the courts concerning the standards to be applied to violations of administrative regulations in a case tried under general Federal maritime tort law, conflict which warrants the refinement of a Supreme Court decision.

The *en banc* Court of Appeals below was sharply divided as to whether negligence *per se* or evidence of negligence

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* Admittedly the District Court may have erred in applying Maryland law rather than general maritime law, but, the error was harmless since violation of the licensing regulation involved herein should at most be considered evidence of negligence no matter what law is applied.

was the proper standard. Of the nine judges six believed that the negligence *per se* standard was the proper one while three believed that the charge of the trial court was correct. Furthermore, Judge Haynsworth, who did not participate in the *en banc* as he had recently accepted senior status, as a participant in the original panel had favored the evidence of negligence charge. Indeed, even Judge Murnaghan, who felt negligence *per se* to be the proper standard, noted in his dissent based on plaintiff's counsel's violation of Rule 51, Federal Rules of Civil Procedure, the division in the court as to the standard to be applied and the difficulty in determining the correct standard. (41a.)

There are few maritime cases since the adoption of the 1972 Amendments to the LHWCA which are helpful in determining which standard should be applied. In one of the few cases decided under negligence principles before the enactment of the amendments, *Marshall* v. *Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964), the Court, opting for a case by case analysis as to which negligence standard should apply, held that a violation of the particular Coast Guard regulation before it did not warrant a negligence *per se* charge.

In reaching its decision the Fifth Circuit analyzed whether the regulation was intended to protect the class of persons to which plaintiff belonged and whether it was designed to protect against the type of injury which occurred. If it had met those criteria a *per se* standard would have been applied.

Indeed, since the decision in this case, that same Court conducted a similar analysis in the case of *Melerine* v. *Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981). In a decision rendered on October 23, 1981 the Fifth Circuit

Court of Appeals, in a case, as this, brought under 33 U.S.C. 905, refused to apply a negligence *per se* standard to the violation of a regulation promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678 (OSHA), on the ground that the plaintiff was not within the class of persons which the regulation was designed to protect.

In non-maritime cases the courts are widely split as to which negligence standard should apply. Of the states catalogued by Judge Hall in his dissent to the *en banc* majority below, twenty-seven have adopted a negligence *per se* standard while seven view a statutory or regulatory violation as evidence of negligence. Yet of those twenty-seven negligence *per se* states, twenty recognize an exception to that rule for licensing statutes such as that in this case. Further, in the seven "evidence of negligence" jurisdictions, the lack of a license is considered immaterial and thus such evidence cannot be presented to the jury at all. (37a-38a, n. 1 and 2.)

Prosser recognizes this exception for licensing regulations:

> Most licensing statutes, such as those applicable to automobile drivers or physicians, have been construed as intended only for the protection of the public against injury at the hands of incompetents and to create no liability where the actor is in fact competent but unlicensed.

Prosser, Torts (4th ed. 1971) p. 196.

The opinion of the *en banc* Court below merely sets forth a negligence *per se* test but does not set forth the reasons for its conclusions. It relies heavily upon the case of *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), which

sets forth a test similar to that in *Marshall*: "violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury [which] in fact occurred," (quoted at 24a). But the Court never went through the analysis which, for example, the Fifth Circuit did in *Melerine* or *Marshall*. As Judge Hall noted in his dissent the majority appears to adopt a negligence *per se* standard as the general Federal rule. (36a.) They reach the conclusion that negligence *per se* should apply here without analyzing whether the licensing regulation involved was intended to protect someone such as Duty from the type of injury which he claims occurred. The Court merely concluded such intendment without any explanation or analysis. The Court further rejected the licensing exception, accepted by the vast majority of jurisdictions, both by refusing to recognize one and further by stating that it should not apply to the particular regulation applicable in this matter. (34a.)

An analysis of the facts and the regulations here should result in the rejection of a negligence *per se* standard. A regulation requiring an operator's license is different from a regulation dictating what physical conditions shall or shall not be allowed to exist on shipboard or what safety devices shall be present, or what conduct should take place in a given situation. The implied purpose of an operator's license is to assure that the vessel operator is competent to operate a vessel but the regulation is not a "safety" regulation because it does not create a standard of conduct. Thus the licensing regulation is clearly different from one which might, for example, prohibit a stern-to approach to a bulkhead for the purpose of on-loading passengers. If such were the case then clearly a different situation would exist in the case at bar.

An analysis such as that conducted by the Fifth Circuit in *Melerine, supra,* or suggested by this Court in *Kernan* could only conclude that the licensing regulation herein, not establishing a standard of care, could not be the basis of a *per se* negligence charge.

By applying what appears to be an automatic *per se* negligence standard to the violation of an administrative regulation and by refusing to recognize the licensing exception generally applicable in land based jurisdictions the Court is, in effect, applying a special standard for maritime cases. This is contrary to the intended purpose of the 1972 amendments to 33 U.S.C. 905, as recognized by this Court in *Scindia.*

Accordingly, in order to establish the proper standards for the general Federal maritime law applicable to actions under 33 U.S.C. 905 the writ of certiorari should issue.

B.

There Is a Need for Clarification by This Court as to the Degree of Specificity Required for an Objection to a Charge to Comply With Rule 51, Federal Rules of Civil Procedure.

Rule 51, Federal Rules of Civil Procedure, requires that a party who objects to a jury charge shall "stat[e] distinctly the matter to which he objects and the ground of his objection." The majority panel opinion of the Court of Appeals affirmed the trial court judgment on the ground that the attorney for the plaintiff did not comply with this requirement of Rule 51 in objecting to the trial judge's "evidence of negligence" charge. Accordingly it never reached the substantive issues. The *en banc* Court, however, in adopting the panel dissent deemed the objection to

be adequate, and, upon then considering the substantive issues, reversed.

Judge Murnaghan, in his forceful dissent from the *en banc* majority, reiterated his reasons for finding counsel's objection to be inadequate and ultimately proclaimed that the majority, by accepting the objection as adequate, "has sounded the death knell of the five words in F.R.Civ.P. 51: 'and the grounds of his objection.'" (49a.)

The division within the Fourth Circuit Court of Appeals alone as to the requisite degree of specificity to comply with Rule 51 reveals the need for clarification by this Court. Certainly, if, as a result of the *en banc* opinion Judge Murnaghan is correct and the relevant words of Rule 51 become meaningless in practice, then this Court may want to prevent such undermining of one of the Rules governing civil trial practice throughout the Federal courts.

Judge Murnaghan's majority panel opinion and his *en banc* dissent contains a complete and thorough analysis of his reasons for finding plaintiff's counsel's objection to the District Court's choice to be wholly inadequate. Those reasons, thus, will not be repeated herein at length. Rather, they will be summarized.

Plaintiff's objections to the charge was as follows:

> Your Honor, we have one exception and that would be with respect to the failure to grant what has been marked as Plaintiff's request for Instruction No. 12. The basis for the exception is that it is the Plaintiff's position that, although in the complaint no specific reference was made to Rule (9)(h), that the Plaintiff has provided in the first cause of action a diversity claim based upon the savings to suiters [sic] clause and that it is a maritime claim, which would make the

> maritime law applicable. The incident occurred on navigable waters and it's our position that the maritime law would apply.
>
> Accordingly, the *Provenza* and *Venable* cases which have been cited, along with the *Kernan* case, would require an instruction that a violation of the Coast Guard regulation would be negligence per se as opposed to being evidence of negligence and that if the jury were to find that as a proximate result of that violation, the Plaintiff was injured, then it is negligence in and of itself. That would be ——.

(quoted at 6a.)

As Judge Murnaghan pointed out, the cases cited were only pre-1972 cases, prior to the 1972 LHWCA amendment to 33 U.S.C. 905. Two of the three were applicable only to unseaworthiness claims eliminated by the amendments. The third, *Kernan, supra,* was a Jones Act case, not dealing with common law tort doctrines. Further, counsel never gave the Court reasons why "the evidence of negligence" charge was incorrect, never stated that land-based principles applied and that the proper land-based standard was one of negligence *per se.* (14a.) Counsel simply stated that the matter was maritime but did not state why maritime jurisdiction would require a substantive negligence *per se* charge. (40a.)

As this Court stated in *Palmer* v. *Hoffman,* 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.Ed. 645 (1943) fairness to the trial court requires that objections to a charge be specific enough to put the Court on notice that it is in error. The *en banc* opinion has allowed a substantial deviation from the Rule and thus from a standard of fairness to the District Court.

The reasoning in Judge Murnaghan's two opinions in this case argues far more persuasively than we possibly could, why certiorari should be granted on this issue. The very division amongst the judges of the Fourth Circuit conclusively establishes the need for resolution of this Rule 51 issue by this Court.

It is respectfully urged that the viability of Rule 51 requires the issuance of the writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit, *en banc*.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals
January 23, 1981

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1540

WILLIAM H. DUTY, JR.,

Appellant,

and

RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS COMPANY and TIDEWATER CONSTRUCTION CORPORATION, a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Intervening Plaintiffs,

v.

EAST COAST TENDER SERVICE, INC.,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. ALEXANDER HARVEY, II, *District Judge.*

No. 79-1541

WILLIAM H. DUTY, JR.,

Plaintiff,

and

RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS COMPANY and TIDEWATER CONSTRUCTION CORPORATION, a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Appellants,

v.

EAST COAST TENDER SERVICE, INC.,

Appellee.

Opinion of Court of Appeals—January 23, 1981

Appeal from the United States District Court for the District of Maryland, at Baltimore. ALEXANDER HARVEY, II, *District Judge.*

Argued August 25, 1980 Decided January 23, 1981

Before:

HAYNSWORTH, *Chief Judge;*
WINTER and MURNAGHAN, *Circuit Judges.*

Paul D. Bekman (William H. Engelman, Harriett E. Cooperman, Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A. on brief) for Appellant in 79-1540; (James W. Bartlett, III, Francis J. Gorman, David R. Owen, Semmes, Bowen & Semmes on brief) for Appellant in 79-1541; George J. Koelzer (Thomas D. Monte, Jr., George Beall; Evans, Koelzer, Marriott, Osborne & Kreizman; Miles & Stockbridge on brief) for Appellee.

MURNAGHAN, *Circuit Judge:*

The case involves two mistakes, one by counsel for the plaintiff, one by the district judge. The mistakes relate to the language of a jury instruction. Are we to reverse for judicial error or should we affirm because of counsel's failure to draw pertinent authority to the court's attention which would have readily alerted him to his error, and permitted him to correct it? That is the question.[1]

[1] We speak of error in the instruction as given by the court. However, in part that is only an assumption for the purposes of considering the case. We affirm for failure of the plaintiff to comply with the dictates of Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stat-

Opinion of Court of Appeals—January 23, 1981

THE FACTS

Plaintiff William H. Duty, a carpenter foreman, was employed by the contractor in charge of construction of a liquified natural gas (LNG) port facility located on the navigable waters of the Chesapeake Bay, approximately one mile off the Western Shore of the Bay, near Cove Point, Maryland. Access to and from the job site was provided by East Coast Tender Service, Inc.

Among the vessels utilized by East Coast for such work crew ferrying purposes was the M/V Chandeleur. A certificate of inspection for the Chandeleur,[2] issued by the United States Coast Guard, required operation by a Coast Guard licensed ocean operator, with a deckhand as crew.

On April 26, 1976, the work crew engaged in constructing the LNG port facility of which the plaintiff was the foreman arrived at the LNG platform in the early morning hours. However, the weather deteriorated, leading to high waters and rough seas. East Coast sent the M/V Chandeleur to retrieve Duty's crew.

Robert Jarvis, who was in possession of a valid Coast Guard ocean operator's license, normally commanded the Chandeleur. Douglas Kohlhoff, who served as a deck hand, did not possess a valid Coast Guard ocean operator's li-

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ing distinctly the matter to which he objects *and the grounds of his objection*." (Emphasis supplied)). Hence, actual decision as to whether the instruction should have been in terms of "negligence *per se*," as plaintiff contends, or in the phraseology, "evidence of negligence" employed by the court remains for resolution on another day. We assume, but do not decide, that "negligence *per se*" was the proper standard.

[2] The obtaining of the certificate of inspection was necessitated by law. *See* 46 U.S.C. § 390c(a). So too was operation in conformity with the certificate of inspection. 46 C.F.R., Subparts 186.05, 186.10.

cense, motor vessel operator's license, or motorboat license. Robert Jarvis was on vacation during the week of April 26, 1976, and Kohlhoff was assigned to operate the Chandeleur for the pick-up on April 26, 1976 of Duty's crew.

Kohlhoff attempted a stern approach to the landing platform at the LNG facility. Upon reversal of the Chandeleur's engines, the stern of the vessel went under the loading platform, the pitch of the vessel in the rough seas causing it to strike the wooden loading platform, thereby separating from its fastenings a vertical ladder used by embarking and disembarking personnel. Duty, who was descending the vertical ladder in the course of preparing to board the Chandeleur was thrown and suffered the injuries which were the subject of the law suit.[3]

Duty received Longshoremen and Harbor Workers' Compensation from his employer. The present action against East Coast charging negligence then was filed alleging diversity of citizenship. The complaint was cast in traditional negligence terminology. It did, however, contain a statement that the "cause of action arises under the General Maritime Law of the United States as hereinafter more fully appears." The sole additional "maritime" allegations (1) alluded to operation of the Chandeleur "on navigable waters of the United States;" and (2) asserted "negligent failure of the Defendant to provide and maintain a safe and seaworthy vessel." The jury returned a general verdict in East Coast's favor.

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[3] Denial that the accident occurred at all was one of the defenses. However, in the present posture of the case there was evidence to support the plaintiff's version of the facts, and, since that was so, we must accept them, if we are, indeed, to ascertain whether the plaintiff had sufficiently preserved his right to object to the jury instruction.

The appeal concentrates on the role to be assigned operation of the Chandeleur by a person without the required Coast Guard ocean operator's license. Plaintiff presented a requested jury instruction to the effect that the absence of a licensed ocean operator for the Chandeleur constituted negligence *per se*.[4] The district judge, however, in denying the requested instruction, concluded that, inasmuch as the action arose on a diversity claim, without Duty's including a separate admiralty claim, state law should apply. Consequently, he instructed that the failure to provide a Coast Guard licensed operator was "evidence of negligence."[5]

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[4] PLAINTIFF, DUTY'S, REQUEST FOR INSTRUCTION TO JURY, No. 12

The Court instructs the Jury that the Defendant, East Coast Tender Service, failed to comply with United States Statutes and Coast Guard Regulations, known as 46 U.S.C. Section 390(a)(b)(c) and 29 CFR Section 186.05-1. Those sections provide that a vessel such as the Chandeleur was required to be in compliance with the Certificate of Inspection issued to it by the U.S. Coast Guard. The Certificate of Inspection for the Chandeleur required that the vessel have at least one licensed Ocean Operator aboard the vessel, when the vessel was being operated less than 12 hours in a twenty four hour period. I instruct you that Mr. Kohlhoff, was not a licensed ocean operator on April 26, 1976.

This regulation establishes a standard of care in the very area within which we are concerned. Its requirements are binding in law. The violation of the requirements of this regulation constitutes negligence on the part of East Coast Tender Service as owner of the Chandeleur. Accordingly such negligence entitles the Plaintiff to recover from the Defendant if you find that such negligence was a proximate cause of Plaintiff's injury . . . .

[5] The jury instructions in pertinent part read:

If you should find that the Defendant or any one of its employees or agents violated Coast Guard Regulations you are instructed that such violation is evidence of negligence and may be considered by you in determining whether the Defendant was, under all the circumstances, negligent, and whether such negligence was a proximate cause of the Plaintiff's injuries.

Such was the proper standard, if the negligence law of Maryland governed. *New Amsterdam Casualty Co.* v. *Novick Transfer Co.*, 274 F.2d 916, 923 (4th Cir. 1960).[6] Plaintiff's counsel excepted to the failure to grant the "negligence *per se*" instruction laconically, inadequately, and indeed wrongly by simply stating:

> Your Honor, we have one exception and that would be with respect to the failure to grant what has been marked as Plaintiff's request for Instruction No. 12. The basis for the exception is that it is the Plaintiff's position that, although in the complaint no specific reference was made to Rule (9)(h), that the Plaintiff has provided in the first cause of action a diversity claim based upon the savings to suiters [sic] clause and that it is a maritime claim, which would make the maritime law applicable. The incident occurred on navigable waters and it's our position that the maritime law would apply.
>
> Accordingly, the *Provenza* and *Venable* cases which have been cited, along with the *Kernan* case, would require an instruction that a violation of the Coast Guard regulation would be negligence per se as opposed to being evidence of negligence and that if the jury were to find that as a proximate result of that violation, the Plaintiff was injured, then it is negligence in and of itself. That would be—

THE LAW

The status of the plaintiff as someone already compensated by his employer, under the Longshoremen's and Har-

[6] The district judge also relied on *Allen* v. *State*, 39 Md.App. 686, 389 A.2d 909 (Ct. Spec. App. 1978), *cert. denied*, 283 Md. 729 (1978).

bor Workers' Compensation Act, was manifest. A companion case had been consolidated under which the employer asserted a lien for reimbursement of LHWCA benefits paid against any recovery by the plaintiff in the third-party negligence action against the owner of the vessel.

Prior to amendment in 1972 of the LHWCA, it was manifest that suit under that Act was maritime, both jurisdictionally, on the one hand, and substantively, or respecting the rules governing liability, on the other.[7] In any case in which negligence was pertinent, if there was any difference between maritime negligence law and land-based negligence law, maritime law prevailed.[8] However, in 1972 substantial amendments were made, and, since the accident in Duty's case occurred in 1976, the 1972 amendments to the LHWCA unquestionably applied.

Following the 1972 amendments, 33 U.S.C. § 905(b) provided recovery for "negligence of a vessel." The theretofore existing right to sue for unseaworthiness was abro-

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[7] The Constitution, Article III, Section 2, of course, extends federal judicial power "to all Cases of admiralty and maritime Jurisdiction." *See also Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 627, 628 (1959), a suit in which "[f]ederal jurisdiction was invoked by reason of the diverse citizenship of the parties, and a jury trial was demanded." There were allegations of unseaworthiness and negligence.

> Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were, therefore, within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law.

Cf. Banks v. *Hanover Steamship Corp.*, 43 F.R.D. 374, 376 (D. Md. 1967).

[8] In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953), also a diversity action in which a jury was prayed, the court held:

> True, Hawn was hurt inside Pennsylvania . . . [b]ut he was injured on navigable waters . . . . Consequently the basis of Hawn's action is a maritime tort . . . .

gated.[9] Recovery was described as exclusive of all other remedies against the vessel, with an exception not here pertinent for remedies otherwise provided in the LHWCA. The legislative history makes clear the purpose of the 1972 amendments:

> to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like. . . . [T]he vessel shall not be liable . . . unless it is proven to have acted or have failed to act in a negligent manner such would render a land based third party in non-maritime pursuits liable under similar circumstances.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 3 U.S. Code Cong. & Admin. News, pp. 4703-4704 (1972).[10]

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[9] *See Bess* v. *Agromar Line*, 518 F.2d 738, 740-41 (4th Cir. 1975):

> The 1972 Amendments to the Act specifically preclude an employee of an independent stevedoring contractor from bringing a suit against the vessel 'based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.'

[10] In short, maritime concepts traditionally called "negligence," but embodying concepts at variance with land-based or common law negligence were no longer applicable. Thus, in *Bess* v. *Agromar Line*, 518 F.2d 738, 740, 742 (4th Cir. 1975) the Court held that, after 1972, there no longer was any LHWCA claim for "the shipowner's negligent breach of its nondelegable duty to provide a safe place to work" (indicating that the cause of action resembles unseaworthiness and "is based upon principles of 'no-fault' liability rather than negligence . . ."). To the same effect, *see Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103, 1110 (4th Cir. 1977); *Chavis* v. *Finnlines, Ltd., O/Y*, 576 F.2d 1072, 1078 (4th Cir.

By the 1972 amendment, a LHWCA cause of action under § 905(b), while clearly remaining "maritime" in a jurisdictional sense since the accident occurred on navigable waters,[11] was divested of all special maritime claim characteristics. *Anuszewski* v. *Dynamic Mariners Corp., Panama,* 540 F.2d 757, 759 (4th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977) ("It is equally clear . . . that while longshoremen retain the right to recover damages against a vessel, in such an action they occupy the same position as their land-based counterparts."); *Riddle* v. *Exxon Transportation Co.,* 563 F.2d 1103, 1110 (4th Cir. 1977) ("the Amendments . . . declared that . . . liability . . . was governed by 'land-based' negligence principles and not by 'maritime negligence concepts.'").

A fundamental change, therefore, was brought about by the 1972 amendments. Formerly maritime for all purposes, a § 905(b) action now had a dual nature: jurisdictionally maritime, but substantively land-based. Unseaworthiness was no more, and negligence as defined for certain maritime purposes, such as the non-delegable duty to provide a safe place to work, was also gone. Negligence, henceforth, was

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1978) ("It is well established in this circuit that any determination of negligence on the part of a shipowner under 33 U.S.C. section 905(b) must be based on negligence principles applicable to land-based third parties in nonmaritime pursuits.")

[11] In *Giacona* v. *Capricorn Shipping Co.,* 394 F. Supp. 1189, 1194 (S.D. Tex. 1975), the court directed its attention to the jurisdictional aspects of 33 U.S.C. § 905(b), not the substantive law rules to be applied under it, and held that, after the 1972 amendments, the nature of an action under the statute remained one "of the general maritime law."

See the legislative history cited, *supra,* especially "to place an employee injured aboard a vessel in the same position he would be *if* he were injured in *non-maritime* employment ashore . . . ." (Emphasis supplied).

to be defined solely on land-based, common law principles, divorced from all maritime "negligence" concepts if, and to the extent there was a variance.

Practically, that sweeping change rendered cases involving pre-1972 accidents of little use in ascertaining a negligence rule which should apply in a case arising under the amended statute. Except in the rarest instance, suit before 1972 was brought on unseaworthiness as well as negligence grounds, and anything written about negligence was apt to have been colored by the presence of that or a related maritime tort. *See Giacona* v. *Capricorn Shipping Co.*, 394 F. Supp. 1189, 1191 (S.D. Tex. 1975):

> The longshoreman's maritime negligence cause of action was recognized long before the Longshoremen's Act was passed and existed quite independent of that Act. . . . As a practical matter, however, between the *Sieracki*[12] decision and the 1972 amendments any in-depth treatment of this doctrine in the longshoreman's case was unnecessary because the broader unseaworthiness doctrine was so much easier to prove.

Cf. Arthur v. *Flota Mercante Gran Centro Americana, S.A.*, 487 F.2d 561, 563 (5th Cir. 1973):

> The litigants cite us to no case and our independent research reveals none, in which the regulations were applied when the sole basis for recovery was negligence.

To the limited extent that pre-1972 cases were discussing true negligence, unalloyed with special maritime concepts, of course, they remain persuasive despite the fact that the claims involved were maritime in character. *See Bess* v. *Agromar Line*, 518 F.2d 738, 740-41 n.5 (4th Cir. 1975)

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[12] *Sieracki* v. *Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946).

("To the extent that *Boleski* discussed the liability of the shipowner under negligence principles it remains pertinent despite the 1972 Amendments to the Act."). *Cf. Marshall* v. *Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964).

Nevertheless, to determine what, as between "evidence of negligence" and "negligence *per se*," constitutes post-1972 negligence law, we must write on an unencumbered slate. The cases which have been cited to us in great numbers by the plaintiff are largely irrelevant because they have dealt with identification and application of substantive rules of maritime tort law to which any discussion of negligence law was subordinated.

> Thus operational negligence has been subsumed under the doctrine of unseaworthiness, and a trial court's instruction should no longer attempt to distinguish between the two. . . . [¶] That it is the shipowner's duty to furnish all seamen and longshoremen a safe place to work . . . [is] uniformly acknowledged. . . . This duty, absolute and nondelegable, creates a 'species of liability without fault * * *. Derived from and shaped to meet the hazards which performing the services imposes, the liability is neither limited by conceptions of negligence nor contractual in character * * *. . . .'

Venable v. *A/S Det Forenede Dampskibsselskab*, 399 F.2d 347, 351-52 (4th Cir. 1968), *quoting Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946).

As a source of pertinent post-1972 negligence law, we are first presented with the question of whether the land-based law should be that of the state in which the navigable waters are located on which the accident occurred. The legislative history is unambiguous that it is a uniform federal law, not state law, to which we must turn:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 3 U.S. Code Cong. & Admin. News, p. 4705 (1972).

In short, the objective has been to avoid a situation in which a plaintiff would have a viable cause of action in Portland, Maine although, under exactly identical factual circumstances, he would be unable to recover in Portland, Oregon because of differences in the laws of the two states. That is not to say that the state law might not constitute persuasive authority as to what the federal law should be. However, applying the Maryland law simply because it was state law in this case was wrong. However, inasmuch as federal law and state law might very well coincide, that error would not, in and of itself, be grounds for reversal.

We go further, and assume, for purposes of the case, that federal land-based law would express itself in "negligence *per se*" terms and not in accordance with the Maryland test of "evidence of negligence."

Conduct of Plaintiff's Counsel

An initial reaction then presents itself. Plaintiff's counsel requested the proper instruction, and it was denied. Why then is he not entitled to a reversal and a new trial? Yet it is not enough simply to request an instruction. One must also object, if it is not given, "stating distinctly the

matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51.

The insufficiencies and errors of plaintiff's counsel in the advocacy over the jury instruction should by now be evident. He cited only pre-1972 cases.[13] He merely contended that the fact that maritime law applied entitled him to the requested instruction.

When one is discussing the terminology of a jury instruction one is concerned with the substantive law to be applied, not with jurisdictional considerations. So, in the only way in which the remark could have been pertinent when given, properly the plaintiff should have acknowledged that his claim was not substantively maritime, but rather was one resting on principles of land-based negligence.

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[13] 1. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431, 438 (1958), was a suit involving recovery rights, for a seaman's widow and other dependents, governed by the Jones Act (into which the Federal Employers' Liability Act was incorporated). The recovery was *not* limited to general tort doctrine (i.e. common law, or land-based negligence). The court recognized that the holding expanded the scope of recovery beyond the limits set by common law negligence and rejected "the refined distinctions necessary in common-law doctrine."

2. *Venable* v. *A/S Det Forenede Dampskibsselskat*, 399 F.2d 347 (4th Cir. 1968).

3. *Provenza* v. *American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), *cert. denied*, 376 U.S. 952 (1964). "However, *Provenza* and *Venable* are no longer good law. Both were decided before the 1972 Amendments to the Act. *Provenza* stands for no more than the fact that the vessel owner is liable only if the breach of the regulations by the stevedore creates an unseaworthy condition. Since the vessel owner, subsequent to the 1972 Amendment to the Act is no longer liable to longshoremen for unseaworthy conditions, neither *Provenza* nor *Venable* is of assistance to the appellant." *Chavis* v. *Finnlines, Ltd., O/Y*, 576 F.2d 1072, 1083 (4th Cir. 1978).

Inasmuch as the plaintiff never moved from his untenable position that maritime law, not land-based law, substantively controlled, he at no time brought to the district judge's attention any reasons why, assuming land-based law was properly controlling, the "negligence *per se*" approach was still the proper one, or why the "evidence of negligence" instruction would be wrong. He allowed that point to go by default.[14] The defendant is correct in its Brief when it asserts that the plaintiff never suggested or implied in his Opening Brief that, as a land-based concept, the district judge erred in accepting "evidence of negligence" and rejecting "negligence *per se*."[15]

While not directly pertinent, it may be surmised that, in general, the meticulousness or strict accuracy as to legal principles of plaintiff's counsel had become somewhat tarnished in the eyes of the district judge. Hence a proposition here advanced for specious and fallacious grounds got short shrift, even though it was, in point of jurisprudence, correct.

1. A judge might well be tempted to take a lawyer less seriously where, well after 1972, he includes, in a com-

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[14] In his Brief in this Court, the plaintiff explains:

> In the proceedings below, Duty requested the court to instruct the jury that this case was governed by federal maritime law, and, *therefore*, that East Coast's violation of an applicable Coast Guard regulation constituted negligence, *per se*. (Emphasis added.)

Nowhere did he argue in the trial court that, even if land-based substantive law, rather than maritime law, applied, it should be the federal land-based rule of "negligence *per se*," rather than the State of Maryland "evidence of negligence" rule.

[15] Indeed, he only moved to the correct argument for the first time in his Reply Brief. Throughout his main Brief he continued to base his argument on the "maritime" nature of things, and made no contention that, if land-based law applied, it was federal, not state, law, and called for a "negligence *per se*" instruction.

plaint prepared on behalf of someone covered by LHWCA and suing the ship on a third-party negligence basis, a claim for "negligent failure of the Defendant to provide a safe and seaworthy vessel."

2. Even less professional had been the allegation in the complaint that the "cause of action arises under the General Maritime Law of the United States. . . ." Plaintiff's counsel described it as a precaution, so that no one would conclude that, by pleading a diversity action type tort claim, and praying a jury trial, he was waiving his right to proceed under maritime law, specifically 33 U.S.C. § 905(b).

In the first place, the "precaution" was superfluous. After the holdings in *Kermarec,*[16] the pleading that the

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[16] *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). The plaintiff there filed a diversity action, and prayed a jury. The Supreme Court held:

> If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties. . . . Where the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial.

Id. 628. *Cf. Edynak* v. *Atlantic Shipping Inc. Cie. Chambon Maclovia S.A.*, 562 F.2d 215, 221 (3d Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978):

> That Edynak's complaint invoked only the diversity jurisdiction of the district court is, of course, irrelevant to the applicability of federal maritime law. Pleading only diversity jurisdiction is an appropriate manner of preserving the right to a jury trial.

See Continental Cas. Co. v. *Canadian Universal Ins. Co.*, 605 F.2d 1340, 1344 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1317 (1980):

> However, while jurisdiction to decide the litigation may be concurrent with state courts or invoked in a federal court on some independent basis, maritime law determines the rights of the parties.

injury occurred through operation of a vessel "on navigable waters" fully sufficed. The "saving-to-suitors" clause of 28 U.S.C. § 1333 made plaintiff secure on that point. *Cf. Pryor* v. *American President Lines,* 520 F.2d 974 (4th Cir. 1975), *cert. denied,* 423 U.S. 1055 (1976).

Second, the so-called precaution was actually headed 180 degrees way from the direction in which plaintiff's counsel claims to have been steering. He cites *Harrison* v. *Flota Mercante Grancolumbiana, S.A.,* 577 F.2d 968 (5th Cir. 1978) and a long quotation of the Advisory Committee to the Rules Committee concerning the admiralty unification amendments to the Federal Rules of Civil Procedure. 39 F.R.D. 69, 75-76 (1965).

Both the *Harrison* opinion and the Advisory Committee Note, however, make altogether clear that "a simple statement in his [plaintiff's] pleadings to the effect that the claim is an admiralty or maritime claim" would serve the purpose of making the case a true one in admiralty, and thereby eliminate any possibility of trial by jury. Some plaintiffs desire to proceed by court trial as admiralty requires, and the kind of short statement employed by plaintiff in his complaint is used to preserve the option of no jury trial. Plaintiff would seek to turn things upside-down and make the short statement a vehicle for protecting the election to proceed before a jury. Plaintiff was perhaps fortunate not to have lost trial by jury altogether. The jury prayer, on the one hand, and the short statement that the action arose under General Maritime Law, on the other, were inherently contradictory.

This, then, is a situation in which "maritime," which we have already seen in two guises, "jurisdictional" and "sub-

stantive," takes on a third modality of "procedural." The difficulties of plaintiff's counsel appear to have derived from his inability to distinguish, or to explore the significances of, the three different meanings of "maritime."

Consequences of Plaintiff's Counsel's Failure to State to the District Judge Sound Reasons for His Proffered Instruction

It thus becomes incumbent on us to parse Fed. R. Civ. P. 51 against counsel's behavior to determine whether or not he preserved an objection for appeal. Plaintiff's counsel here did object to the failure to give his requested instruction on "negligence *per se*" lines and to the giving, instead, of an "evidence of negligence" instruction. He stated distinctly the matter to which he objected. He also stated the grounds of his objection, albeit they were faulty and inadequate in law. Perhaps in a purely linguistic sense he has complied with Rule 51.

However, the rule clearly contemplates that, to preserve the objection, he must have raised an *adequate* ground at the time. He was not permitted to state a faulty reason, and then, after the jury had retired, and the opportunity to correct any erroneous aspect of the instructions not called to the district judge's attention was gone, to raise additional reasons. 9 Wright and Miller, *Federal Practice and Procedure*, § 2554:

> The grounds must be stated with sufficient clarity that the trial judge may see what they are and follow them if well taken. . . . A party may not state one ground when objecting to an instruction and attempt

to rely on a different ground for the objection on appeal or on a motion for a new trial.[17]

In *Tropea* v. *Shell Oil Co.*, 307 F.2d 757, 769 (2d Cir. 1962), it was held:

> Perhaps the judge should not have added to his charge that Tropea did not 'assume the hazards from someone else's negligent acts.' But this was not reversible error because Maripet's objection to the charge, when it was given, did not distinctly apprise the trial judge, as was required by Rule 51 of the Federal Rules of Civil Procedure . . ., in what way this part of his charge might have been erroneous.

See Palmer v. *Hoffman*, 318 U.S. 108, 119 (1943):

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error, and where part of the charge was correct, he may not through a general exception obtain a new trial.[18]

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[17] *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1031 (4th Cir. 1976) (Butzner, J., concurring), *cert. denied*, 429 U.S. 1041 (1977):

> Although the defendant objected to the submission of the issue of punitive damages to the jury, it did not comply with Rule 51 of the Federal Rules of Civil Procedure by objecting to the Court's test for the recovery of such damages.

[18] The *Duty* case illustrates the wisdom of the rule. As the matter was put to the district judge, the conclusion reached by him was entirely reasonable. The trial court generally is disadvantaged in not having the time for rumination and reflection vouchsafed

There only remains for consideration the question whether there was "plain error" requiring a new trial even in the absence of an adequate objection under Rule 51. *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1031 (4th Cir. 1976) (Butzner, J., concurring), *cert. denied*, 429 U.S. 1041 (1977):

> Most circuits have said that an appellate court may reverse for plain error where necessary to prevent a

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to those of us who decide cases on appeal. We have a greater opportunity to piece things together, even when the help of counsel is inadequate. Yet considerations of fairness, and ultimately of better dispensation of justice, dictate that lawyers should not be encouraged to delay raising valid legal points until an appeal has been taken. Judges and opposing counsel should be able to treat a case as it is presented, not as it might better be or have been presented. Consequently, we regularly refuse to consider arguments not presented in the lower court. *United States* v. *One 1971 Mercedes Benz*, 542 F.2d 912, 915 (4th Cir. 1976) ("Questions not raised and properly preserved in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances.")

We have, of course, no way of knowing whether the failure to apprise the trial judge of the proper legal underpinnings for plaintiff's jury request was intentional or merely careless. We assume it was the latter. Yet it does not strain credulity to contemplate, in the circumstances of the case, a knowing failure to inform the judge of why he was wrong in the instruction he gave. In a case put to the jury on a general verdict basis, it probably mattered very little, in terms of the probabilities of which party the jury would ultimately favor, whether the charge was in "negligence *per se*" language, or in "evidence of negligence" terms. Whether proximate cause had been established would, on the particular facts of the case, predominate.

We should certainly be loath to put the plaintiff in the happy position of being able knowingly to let the case go to the jury once on the erroneous instruction, with a right guaranteed to a second chance if he didn't like the outcome the first time around. Yet it is altogether dubious whether silence through ignorance on trial counsel's part should be rewarded in that fashion, when purposeful silence would not.

miscarriage of justice despite the defendant's failure to comply with Rule 51.

Ramsay v. *Travelers Ins. Co.*, 317 F.2d 300, 302 (4th Cir. 1963). In both those cases, while recognizing the principle, the court did not perceive a miscarriage of justice, and so did not apply the plain error exception to Rule 51. However, in *Edwards* v. *Mayes*, 385 F.2d 369, 373 (4th Cir. 1967), where the applicable state law made it prejudicial error to fail to instruct that excessive speed was "negligence *per se*," the Court applied the plain error rule.

However, that case does not compel a reversal for failure to give a "negligence *per se*" instruction in Duty's case, assuming that it would constitute the correct exposition of the law. In *Edwards*, the issue was core-central to the litigation. Duty's case, on the other hand, involved a variety of issues on which the jury may well have rested its decision. There was, for example, a substantial basis for a finding that the accident never, in fact, occurred. While there is a significant difference between "evidence of negligence" and "negligence *per se*" which would have required that we resolve the issue between "negligence *per se*" and "evidence of negligence," and, therefore, perhaps reverse had plaintiff's counsel complied with Rule 51, we recognize that there is a substantial overlap of the two concepts, so that Duty did not suffer a miscarriage of justice in going to the jury on "evidence of negligence" when his counsel neglected to make the objection necessary to preserve the right to a "negligence *per se*" instruction.

The case of *Barger* v. *Mayor & City Council of Baltimore*, 616 F.2d 730, 733-34 (4th Cir. 1980) (appeal pending) is instructive. A negligence *per se* instruction which was given did not accurately state the law. The failure to comply

with Rule 51 precluded the appellant. The court concluded that there was no "miscarriage of justice," and that "justice will not be disserved by allowing the verdicts in this case to remain undisturbed."

Accordingly, we affirm.

AFFIRMED.

WINTER, Circuit Judge, dissenting:

Because I am persuaded that notwithstanding the 1972 amendments to the LHWCA a cause of action thereunder is still a maritime action, I am led to conclude that counsel complied with F. R. Civ. P. 51 and preserved the question of the correctness of the instruction for review. I think also that the district court was in error in giving the "evidence of negligence" instruction rather than the requested "negligence per se" instruction. As I analyze the majority's opinion, it avoids this result by elevating what is concededly only a semantic difference with plaintiff's counsel to a matter of substance and by misreading the purpose and legislative intent of the 1972 amendments. It seems to me also that the majority falls into error by attempting to create a dichotomy between compliance with Rule 51 and the correct instruction to be given. As I shall attempt to show, these issues are closely intertwined, if not part and parcel of a unitary concept. One cannot be decided without the other. Because I think that both should be decided in plaintiff's favor, I respectfully dissent.

I.

I begin by discussing what is a proper negligence instruction following the 1972 amendents—in essence, what

the 1972 amendments did to existing maritime negligence law.

As the majority shows, the purpose and effect of the 1972 amendments was to abolish a longshoreman's cause of action against a ship on the theory of unseaworthiness, while preserving his cause of action for negligence. It is equally clear that this cause of action for negligence was to be administered on the basis of uniform federal law, and, although the test for negligence should coincide with the test employed in non-maritime pursuits, that the uniform law was maritime in nature:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.

H. R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News, 4705.

I disagree with the majority that the 1972 amendments created an action jurisdictionally maritime but substantively land-based. As the quotation from the committee

report set forth above clearly demonstrates, the admiralty concepts of comparative negligence and preclusion of the defense of assumption of the risk were not dislodged in any case where contributory negligence was a factor. One need only read *Crowell* v. *Benson*, 285 U.S. 22, 39, 41-2 (1932), to conclude inescapably that the LHWCA was enacted in the exercise of the power of Congress to alter and revise the maritime law. A longshoreman's right to sue under 33 U.S.C. § 905(b) for the negligence of a vessel is a maritime cause of action. While it is correct to say that, by the 1972 amendments, the maritime rule by which his right to recover is to be judged should conform to land-based negligence law, except where there is an issue of contributory negligence, it is most assuredly incorrect to conclude that the 1972 amendments converted a maritime rule into a land-based rule.

If a uniform federal law as to the effect of the violation of a safety regulation is to be applied, *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), provides a helpful starting point in determining such a rule. That case held that under the Federal Employers' Liability Act, as extended to seamen by the Jones Act, not only is the violation of a statutory duty where the injury is one which the statute was designed to prevent negligence per se, but "a violation [of the statute] creates liability . . . if the resulting defect or insufficiency in equipment contributes in fact to the death or injury in suit, without regard to whether the injury flowing from the breach was the injury the statute sought to prevent." 355 U.S. at 433. Of course, *Kernan* established the quoted rule of liability only for wrongful death actions under the Jones Act. In doing so, as the majority points out, it refused to apply "the refined distinctions necessary in common-law tort doctrine." 355

U.S. at 438. However, even in finding common law negligence principles inapplicable, the *Kernan* opinion defines the general common-law rule "that violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury [which] in fact occurred." *Id. Kernan,* it seems to me, not only provides significant aid in determining the general maritime negligence rule applicable under LHWCA, but it obviously was not displaced by the 1972 amendments,[1] as were *Venable* v. *A/S Det Forenede Dampskibsselskab,* 399 F.2d 347 (4 Cir. 1968), and *Provenza* v. *American Export Lines, Inc.,* 324 F.2d 660 (4 Cir. 1963).

Should there be doubt that *Kernan* offers the correct model for deciding that "negligence per se", and not "evidence of negligence", is the proper test, that doubt is put to rest by Restatement (Second) of Torts § 286, which states that a court "may adopt as the standard of conduct of a reasonable man the requirements of . . . an administrative regulation whose purpose is found to be exclusively or in part . . . to protect a class of persons which includes the one whose interest is invaded . . . ." Plaintiff here was within the protected class of persons, and the license requirement was designed to protect the particular interest invaded against the very harm inflicted. In concluding that this is a case of negligence per se, the Restatement is in accord with the weight of authority, although not in accord with the Maryland law applied by

[1] At the outset of the *Kernan* opinion, the Court specifically disclaims reliance on principles of unseaworthiness. 355 U.S. at 428-29. As the majority opinion states, "To the limited extent that pre-1972 cases were discussing true negligence, unalloyed with special maritime concepts, of course, they remain persuasive despite the fact that the claims involved were maritime in character."

the district court. *See* Prosser, Torts (4 Ed. 1971) p. 200-01.

II.

Having thus shown that plaintiff was entitled to an instruction that defendant's failure to employ a person with the required Coast Guard license to pilot the *M/V Chandeleur* on the date of the accident was negligence per se, I turn to the question of whether the issue has been preserved for review. In short, was there compliance with F. R. Civ. P. 51? I would conclude that there was.

Plaintiff's request for instruction No. 12 was precisely what plaintiff was entitled to receive. It would have submitted to the jury only the issue of probable cause. The instruction was refused, but it is crystal-clear that it was refused because the district court was of the view that the court was solely exercising diversity jurisdiction, that the law of Maryland controlled and that the Maryland rule was that violation of a regulation was, at most, evidence of negligence but not negligence per se.[2] Indeed, the district court even went so far as to intimate that were the case under the admiralty jurisdiction of the court, it would have instructed the jury that violation of the regulation was negligence per se.[3] But the district court was firm in

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[2] Now, when we get to No. 12, this requires a ruling as to the sort of claims presented here. First of all, it is quite clear that the claim is a diversity claim. Indeed, the Plaintiff would not have a jury otherwise. So, in instructing the jury so far as a violation of Coast Guard regulations is concerned, the question is, is it negligence per se or is it evidence of negligence.

Now, the ruling of the Court is that, under Maryland law, which we are applying in diversity, it is only evidence of negligence . . . .

[3] Now, the next question comes up as to whether the jury should be instructed that there is an admiralty claim, that under the admiralty claim the rule would be different, that violation of the

its view that plaintiff had invoked only diversity jurisdiction and not maritime jurisdiction, notwithstanding that the complaint alleged that "[t]his cause of action arises under the General Maritime Law of the United States . . .," and defendant's answer admitted this allegation.

Plaintiff excepted to the failure to give his requested instruction, and the majority has set forth the text of his statement. Summarized, his position was that he was pursuing a maritime claim under diversity jurisdiction under the saving to suitors clause,[4] but that his claim was a maritime one which made maritime law applicable. Citing

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regulation would be negligence per se. The Plaintiff has relied on the Provenza case in that regard.

After considering the pleadings here, I am satisfied that there is no admiralty claim, particularly when we get down to the question of instructing the jury on the same point in two different ways, one under diversity law and one under admiralty law. . . . . So I will not instruct the jury that there is a separate claim and that under the separate claim the evidence is to be considered in a different way, particularly the Coast Guard regulations, than it would be under the Maryland law, the diversity claim. So I am going to instruct the jury solely under the Maryland law of negligence, which, of course, would apply to an accident such as this one.

[4] That he had a right to do so is beyond question. As stated in Gilmore and Black, The Law of Admiralty (Second Ed. 1975) § 1-13:

> The Judiciary Act of 1789, it will be recalled, while bestowing "exclusive" admiralty jurisdiction on the District Courts, saved "to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." . . .
>
> Summarily, the result of the cases is that a suitor who holds an *in personam* claim, which might be enforced by suit *in personam* in admiralty, may also bring suit, at his election, in the "common law" court—that is, by ordinary civil action in state court, or in federal court without reference to "admiralty", given diversity of citizenship and the requisite jurisdictional amount. (footnotes omitted).

Provenza, Venable and *Kernan, supra,* he repeated that he was entitled to an instruction that violation of the regulation "would be negligence per se as opposed to being evidence of negligence . . . ." The district court commented on the exception, saying that "[i]t was not only that you did not mention 9(h) [F.R. Civ. P.][5] but that it was not even pleaded as a separate cause of action. I have no doubt that if properly pleaded and properly referred to in the pretrial order, you could have pinned a maritime claim to a diversity claim."

It seems quite evident to me that plaintiff's counsel fully complied with F. R. Civ. P. 51 by "stating distinctly the matter to which he objects and the grounds of his objection." He identified the erroneous instruction to which he objected, he identified the correct instruction which he should have been given, and he correctly identified for the district court the source of its error. In asserting that plaintiff's case was a maritime case and that maritime law, not the Maryland law of negligence, was applicable, he was completely correct. I think that he was correct also in identifying *Kernan* as a source of the federal law even though his references to *Provenza* and *Venable* were inapposite. But I do not think that even the majority would hold that a partial reference to inapposite authority would doom the effectiveness of an objection under Rule 51. Since

[5] F. R. Civ. P. 9(h) permits a pleading or a count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also cognizable on another jurisdictional basis to contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c) (third-party practice), 38(e) (right to jury trial), and 82 (venue). Form 2 of the Appendix of Forms, supplementing Rule 84, states that a pleader desiring to invoke the distinctly maritime procedures referred to in Rule 9(h) should allege: "This is an admiralty or maritime claim within the meaning of Rule 9(h)." Evidently it was to the absence of this allegation to which the district court was referring.

the district court's basic error was in treating the case solely as one under diversity jurisdiction where, under familiar *Erie* principles, the law of Maryland applied, and failing to recognize that under the saving-to-suitors clause a maritime cause of action could be pursued under diversity jurisdiction, it manifestly would have availed counsel nothing to elaborate on the authorities which would indicate with what land-based negligence rules a maritime cause of action under § 905(b) should be made to comport. In any event, such an elaboration was unnecessary since the district court indicated that, had it recognized plaintiff's cause of action as maritime in nature, it would have granted the requested instruction. Thus, the majority's complaint that plaintiff's counsel "merely contended that the fact that maritime law applied entitled him to the requested instruction," even if entirely accurate as a factual matter, is wholly inapposite.

There remains for comment only those authorities on which the majority relies for its conclusion that there was noncompliance with Rule 51. The text, 9 Wright and Miller, Federal Practice and Procedure, § 2554, says, of course, what the majority quotes. Significantly, however, it adds:

> Rule 51 is not top-heavy with technical excuses for overlooking trial errors. No particular formality is required so long as it is clear that the trial judge was informed of possible errors and was given an opportunity to correct them.

The cases on which the majority relies deal not with counsel's reliance on a faulty theory of law,[6] but with his

[6] While the majority concludes that plaintiff's counsel relied on a faulty theory of law to support his entitlement to the requested instruction, it is evident that I think differently.

failure to identify specifically the particular portion of an instruction to which he objects. In *Palmer* v. *Hoffman,* 318 U.S. 109 (1943), plaintiff relied on several causes of action, and the trial judge gave a general instruction regarding burdens of proof. The defendant objected generally without specifying how the burdens should be allocated with regard to specific causes of action. The Supreme Court found the instructions erroneous as to a particular cause of action, but held defendant's "general exception" insufficient. Likewise in *Tropea* v. *Shell Oil Co.,* 307 F.2d 757, 769 (2 Cir. 1962), the Second Circuit found one phrase in an instruction erroneous, but found no reversible error because counsel never told the trial judge in what way the specific passage was wrong. Finally, in *Appleyard* v. *Transamerican Press, Inc.,* 539 F.2d 1026, 1031 (4 Cir. 1976) (Butzner, J., concurring), the defendant objected only to the submission of a punitive damages issue to the jury. In his concurrence, Judge Butzner noted that this objection was insufficient to preserve the question of what standard should be applied in determining whether punitive damages should be assessed.

These cases, in short, involve overly general objections or objections addressed to the wrong issue. In this case, plaintiff's objection addressed the same issue he challenges on appeal: the application of Maryland law. His failure, if any, was only in setting out the theory now espoused by the majority underlying the proper choice of law.[7] The language of a Tenth Circuit case is directly in point:

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[7] I think it clear that my differences with the majority in this regard are based largely on semantics. I find that the 1972 amendments to LHWCA call for the application of a uniform federal *maritime* law which looks to general land-based common-law negligence principles for much of its substance. The majority finds that

> A formal objection need not include detail of supporting argument in order to fully apprise the court of the grounds of the objection.

Darter v. *Greiner,* 301 F.2d 772, 775 (10 Cir. 1962).

I repeat that I think that plaintiff met the requirements of Rule 51. To my mind, only by insistence on articulation with the nicety and precision of language in an appellate opinion, may one conclude otherwise.

LHWCA calls for application of a uniform federal *land-based* law of negligence, abandoning any reference to the "maritime" nomenclature. Only counsel's failure to phrase his objection in terms reflecting the majority's view on this semantic difference of opinion, I fear, prevents the majority from addressing the substance of plaintiff's claim.

Opinion of Court of Appeals
September 1, 1981

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1540

WILLIAM H. DUTY, JR.,

Appellant,

and

RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS COMPANY; and TIDEWATER CONSTRUCTION CORPORATION, a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Intervening Plaintiffs,

v.

EAST COAST TENDER SERVICE, INC.,

Appellee.

No. 79-1541

WILLIAM H. DUTY, JR.,

Plaintiff,

and

RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS COMPANY and TIDEWATER CONSTRUCTION CORPORATION, a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Appellants,

v.

EAST COAST TENDER SERVICE, INC.,

Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore. ALEXANDER HARVEY, II, *District Judge.*

Opinion of Court of Appeals—September 1, 1981

Argued June 1, 1981 Decided September 1, 1981

Before WINTER, Chief Judge, BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, and ERVIN, Circuit Judges, sitting in banc.

Paul D. Bekman (William H. Engelman, Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A. on brief) for Appellant William H. Duty, Jr.; David R. Owen (Semmes, Bowen & Semmes on brief) for Appellant Raymond International, Inc., et al.; George J. Koelzer (Thomas D. Monte, Jr., George Beall, Evans, Koelzer, Marriott, Osborne and Kreizman; Miles & Stockbridge on brief) for Appellee.

PER CURIAM:

William H. Duty, Jr. appeals from a judgment entered on a jury's verdict for defendants in his suit for personal injuries sustained while he was employed as a marine construction carpenter foreman, brought under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), and under the district court's diversity jurisdiction. He claims error in the district court's instruction to the jury that proof that a motor vessel, which collided with a loading dock and caused him to be thrown from a ladder, was operated by an unlicensed operator in violation of Coast Guard rules was only evidence of negligence and not negligence *per se*, on the part of the owner.

The case was originally heard by a panel of this court which affirmed the district court's judgment in a split decision. *Duty* v. *East Coast Tender Service, Inc.*, 660 F.2d 933 (4 Cir. 1981). Judge Murnaghan, joined by Chief Judge Haynsworth, decided that Duty had failed to fulfill

the requirements of Rule 51, F.R. Civ. P. in objecting to the district court's jury instruction. The panel therefore affirmed without reaching the merits of Duty's claim. In dissent, Judge Winter expressed the view both that the objection was preserved pursuant to Rule 51 and that the instruction was legally erroneous.

Because of the importance of the question as to the meaning and scope of Rule 51 as well as to the legal standard to be applied in an action under § 5(b) of LHWCA since the 1972 amendments when there is evidence of a violation of a licensing regulation, we granted rehearing in banc.* We reverse and grant a new trial.

As we have indicated the appeal presents two issues: (1) was there compliance with Rule 51 with regard to the district court's contested instruction to the jury; and if so, (2) what was the correct instruction to be given?

As to the first issue, Chief Judge Winter, Judge Butzner, Judge Widener, Judge Hall, Judge Phillips, Judge Sprouse and Judge Ervin agree that there was compliance with Rule 51 and that the contested substantive issue was preserved for appellate review for the reasons expressed in Judge Winter's dissenting panel opinion. Judge Russell expresses no view on this issue because he is of the opinion that the challenged instruction was legally correct and hence he need not decide the issue of preservation under Rule 51. For the reasons set forth in his majority panel opinion, Judge Murnaghan remains of the view that there was non-compliance with Rule 51 and that we should not reach the substantive issue.

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* Following the panel decision and before argument, Chief Judge Haynsworth elected to take senior status. He therefore became ineligible to be a member of the in banc court. *See* 28 U.S.C. § 46(c).

As to the substantive issue, Chief Judge Winter, Judge Butzner, Judge Phillips, Judge Murnaghan, Judge Sprouse and Judge Ervin agree that, for the reasons set forth in Judge Winter's dissenting panel opinion, the instruction given was legally incorrect. The jury should have been instructed that the operation of the motor vessel without a licensed operator in violation of a regulation of the Coast Guard was negligence *per se*, leaving for the jury to decide as to liability only whether that negligence was a proximate cause of the collision resulting in plaintiff's injuries.* Judge Russell, Judge Widener and Judge Hall

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* In his dissenting opinion, Judge Hall suggests that the weight of authority supports a "licensing exception" to the general rule that violation of a statute is negligence *per se*. The majority respectfully disagrees. The cases relied upon by the dissent create no such exception. Instead they hold largely that, despite the violation of a licensing statute by defendants, plaintiffs may not recover where they have proved no causal connection between the failure to possess a license and the injury suffered. *See, e.g., Byrne* v. *Matczak*, 254 F.2d 525 (3 Cir.), *cert. denied* 358 U.S. 816 (1958); *Shaw* v. *Hart*, 136 Ind. App. 567, 202 N.E.2d 587 (1964); *Mount Nebo Baptist Church* v. *Cleveland Crafts Co.*, 154 Ohio St. 185, 93 N.E.2d 668 (1950); *Carpenter* v. *Lyons*, 78 Ga. App. 214, 50 S.E.2d 850 (1948); *Kurtz* v. *Morse Oil Co.*, 114 Conn. 336, 158 A. 906 (1932).

The majority's holding in this case is perfectly consistent with that principle. A negligence *per se* instruction does not create strict liability; it would not remove the issue of proximate cause from the jury. Properly instructed, the jury still would be required to determine whether defendant's negligence in the use of an unlicensed operator caused or contributed to plaintiff's injury.

Moreover we think it entirely proper to adopt as the appropriate rule of federal maritime law that a violation of this particular licensing requirement is negligence *per se* despite automobile cases to the contrary. This requirement pertains to the operation of a vessel which is intended to carry more than six passengers, as well as other members of the crew. 46 C.F.R. §§ 176.01-1 and 186.05-1. The regulation is designed to insure that there shall be on such vessels *a* person whose competence to operate it or to direct its operations has been assured. This is simply a different kind of licensing requirement than those pertaining to the operation of private motor vehicles.

are of the view that violation of the regulation was only evidence of negligence, not negligence *per se*, and that the jury was correctly instructed. They would affirm the judgment of the district court.

We need say little more except to take note of *Scindia Steam Navigation Co., Ltd.* v. *De Los Santos*, —— U.S. —— (April 21, 1981), decided subsequent to the panel's decision of the instant case. That case, as is the instant case, was a suit by a longshoreman (here a harbor worker) under LHWCA for personal injuries allegedly sustained as a result of the negligence of a vessel. In deciding that a shipowner may be liable for negligence when he knows or should have known of a hidden danger but failed to warn the stevedore of it, the Court lent strong support to the view that a negligence action under § 905(b) is more properly called "maritime" than "land-based."

Significantly, in defining the vessel's duty to longshoremen to exercise "due care under the circumstances," the Court referred not to the Restatement or to other land-based sources but to a pre-1972 LHWCA case which dealt with negligence. *See* 79 U.S.L.W. at 4408, *citing Marine Terminals* v. *Burnside Shipping Co.*, 394 U.S. 404, 415 (1969). The Court was even more specific in describing the sources of negligence law under § 905(b):

> Because the legislative history suggests that the shipowner's liability is to be judged by land-based standards, . . . it is urged that the District Court properly turned to and applied §§ 343 and 343A of the Restatement (Second) of Torts. But the legislative history does not refer to the Restatement and also states that land-based principles of assumption of risk and contributory negligence are not to be applied in § 905(b)

> cases. This strongly suggests, as *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 628 (1959) [a pre-1972 maritime negligence case], indicated, that maritime negligence actions are not necessarily to be governed by principles applicable in nonmaritime contexts. Furthermore, since the lower courts are not only in disagreement as to the applicability of §§ 343 and 343A but also as to their import and meaning when applied in the maritime context, those sections, while not irrelevant, do not furnish sure guidelines in cases such as this.

49 U.S.L.W. at 4408-09 n.14. If there was any doubt before *Scindia* that a negligence action under § 905(b) might properly be called "maritime," it is erased by this footnote.

Accordingly, with Judge Russell in full dissent, and with Judge Widener, Judge Hall and Judge Murnaghan in partial dissent, we reverse the judgment of the district court and grant plaintiff a new trial.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

The district judge understood the issue before him, ruled correctly and should be affirmed. I dissent.

In opining that the negligence *per se* rule should be, and is, the federal rule, Chief Judge Winter in his dissenting panel opinion has led the majority of this court down the garden path by including licensing statutes within the common-law rule creating liability for violation of a statutory duty. The majority leans heavily on *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), where an accident

occurred because of the violation of a regulation concerning the proper positioning of a navigational light. The per curiam opinion also prepared by Chief Judge Winter does no better by citing *Scindia Steam Navigation Co., Ltd.* v. *De Los Santos,* —— U.S. —— (April 21, 1981), which involves a known hidden danger and failure to warn. Neither of these cases concerns a licensing statute.

The licensing statutes are an exception to the rule relied upon by the majority opinion. The majority cites Prosser in support of its rule. Slip Op. at 30. However, Prosser specifically recognizes the licensing exception, stating:

> Most licensing statutes, such as those applicable to automobile drivers or physicians, have been construed as intended only for the protection of the public against injury at the hands of incompetents, *and to create no liability where the actor is in fact competent but unlicensed.* (Emphasis added.)
> Prosser, Torts (4 ed. 1971) p. 196.

Indeed, the "weight of authority" has adopted the licensing exception to the general rule that violation of a statute is negligence *per se*.[1] In fact, a number of the jurisdictions

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[1] The following are among those jurisdictions which follow the rule of negligence *per se* but recognize an exception from that rule for licensing statutes: Alabama, Arizona, Colorado, Connecticut, District of Columbia, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, and Texas. *Lindsey* v. *Barton,* 260 Ala. 419, 70 So.2d 633 (1954); *Lutfy* v. *Lockhart,* 37 Ariz. 488, 295 P. 975 (1931); *Hertz Drive-Ur-Self System* v. *Hendrickson,* 109 Colo. 1, 121 P.2d 483 (1942); *Kurtz* v. *Morse Oil Co.,* 114 Conn. 336, 158 A. 906 (1932); *Waugh* v. *Suburban Club Ginger Ale Co.,* 83 US App. D.C. 226, 167 F.2d 758 (1948); *Carpenter* v. *Lyons,* 78 Ga. App. 214, 50 S.E.2d 850 (1948); *Shaw* v. *Hart,* 136 Ind. App. 567, 202 N.E.2d 587 (1964); *Schuster* v. *Gillespie,* 217 Iowa 386, 251 N.W. 735 (1933); *Wilson* v. *Rogers,* 140 Kan. 647, 38 P.2d 124 (1934); *Baber* v. *Merman,* 249 S.W.2d 142 (Ky.

require an instruction that, absent a showing of incompetence, the jury should not even consider lack of a license in its determination of negligence.[2]

1952); *Janssen* v. *Mulder*, 232 Mich. 183, 205 N.W. 159 (1925); *Mahowald* v. *Beckrich*, 212 Minn. 78, 2 N.W.2d 569 (1942); *Myrick* v. *Holifield*, 240 Miss. 106, 126 So.2d 508 (1961); *Siess* v. *Layton*, 417 S.W.2d 6 (Mo. 1967); *Phass* v. *MacClenathen*, 274 App. Div. 535, 85 N.Y.S.2d 643 (1948); *Mt. Nebo Baptist Church* v. *Cleveland Crafts Co.*, 154 Ohio St. 185, 93 N.E.2d 668 (1950); *Bennett* v. *Morris Farrar Truck Co.*, 520 P.2d 705 (Ok. 1974); *Halsan* v. *Johnson*, 155 Or. 583, 65 P.2d 661 (1937); *Byrne* v. *Matczak*, 254 F.2d 525 (3d Cir.), *cert. denied* 358 U.S. 816 (1958); *St. Louis, B. & M. Ry.* v. *Price*, 244 S.W. 642 (Tex. Civ. App. 1922).

California, Illinois, Maryland, Nevada, New Jersey, Vermont and West Virginia apply the evidence of negligence rule to all statutory violations except in cases of licensing. In these jurisdictions lack of a license is considered immaterial and not even considered evidence of negligence. *Strandt* v. *Cannon*, 29 Cal. App.2d 509, 85 P.2d 160 (1938); *Perry* v. *Richerson*, 3 Ill. App. 2d 338, 122 N.E.2d 75 (1954); *Davis* v. *Gordon*, 183 Md. 129, 36 A.2d 699 (1944); *Mitrovich* v. *Pavlovich*, 61 Nev. 62, 114 P.2d 1084 (1941); *Ross* v. *Pennsylvania R. Co.*, 106 N.J.L. 536, 148 A. 741 (1930); *Dervin* v. *Frenier*, 91 Vt. 398, 100 A. 760 (1917); *Hersman* v. *Roane County*, 86 W.Va. 96, 102 S.E. 810 (1920).

Even in Delaware, North Carolina, South Carolina, Virginia, and Washington, where lack of a license is considered negligence *per se*, the courts have found that there was no causal connection between the license and the accident and therefore no recovery as a matter of law. *Brown* v. *Green & Flinn*, 29 Del. 449, 100 A. 475 (1917); *Ham* v. *Greensboro Ice & Fuel Co.*, 204 N.C. 614, 169 S.E. 180 (1933); *Cirsosky* v. *Smathers*, 128 S.C. 358, 122 S.E. 864 (1924); *Laughlin* v. *Rose*, 200 Va. 127, 104 S.E.2d 782 (1958); *White* v. *Kline*, 119 Wash. 45, 204 P. 796 (1922). Only in New Hampshire and Massachusetts does failure to have a license constitute *prima facie* evidence of negligence, and in Massachusetts it only applies to registration of the car, not licensing of the driver. *Vassillon* v. *Sullivan*, 94 N.H. 103, 47 A.2d 120 (1946); *see* Prosser, Torts (4th ed.), p. 183.

[2] Among the jurisdictions which have overturned trial court judgment on the grounds that the nonexistence of a license should not have been admitted into evidence are: California, Connecticut, Georgia, Minnesota, Nevada, New York, and Pennsylvania. *See* note 1, *supra*, and cases cited therein.

I believe this to be the better rule and the one which we should follow in this case. The liability of the vessel owner must be determined from the acts of the seaman as he brought the vessel to the pier. The record demonstrates that the helmsman of the *Chandeleur* was an experienced, competent seaman who was pressed into service at the last minute. The fact that he did not have a license in his pocket had nothing to do with the accident.[3] As it stands, the district court went far beyond the requirement of most jurisdictions by instructing the jury that the lack of a license is evidence of negligence.[4]

Accordingly, I would affirm.

MURNAGHAN, Circuit Judge, dissenting:

My dissent derives from a very simple proposition. As the distinguished Professor Moore has pointed out, the provisions of the Federal Rules of Civil Procedure "are to be observed by all." 2 Moore's *Federal Practice* ¶ 1.13 [1]. By the same token *all* of "the provisions of the rules are to be observed."

Plaintiff requested a jury instruction in terms of "negligence *per se*." A majority of the *en banc* court, including myself, agree that it would have been the accurate state-

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[3] The Coast Guard regulation in this case did not require that the helmsman be licensed. It only required that ". . . the vessel have at least one licensed Ocean Operator aboard. . . ." 46 C.F.R. 186.05-1 (1980).

[4] Indeed, the district court went beyond even the requirement of the forum state from which the evidence of negligence instruction was taken. Maryland law holds that lack of a license is immaterial and cannot even be considered evidence of negligence. *Davis* v. *Gordon*, 183 Md. 129, 36 A.2d 699 (1944).

ment of the law, rather than the charge of "evidence of negligence," which the district judge gave.

Yet the reasons advanced by the lawyer for the plaintiff, at the time of discussion between court and counsel of jury instructions, were inadequate, unhelpful, and, indeed, misleading. The unadorned statement, neither amplified nor explained, was made that maritime law prevails.[1] Accepting that statement to be true and giving no weight to the established rule that the applicable maritime law has opted to borrow its substance in cases of the kind with which we here deal from land-based negligence, the fact remains that classification of the law as "maritime" does nothing to resolve the question of whether a rule of negligence *per se* or a rule of evidence of negligence is the applicable one.[2]

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[1] Counsel's words were:

> Your Honor, we have one exception and that would be with respect to the failure to grant what has been marked as Plaintiff's request for Instruction No. 12. The basis for the exception is that it is the Plaintiff's position that, although in the complaint no specific reference was made to Rule (9)(h), that the Plaintiff has provided in the first cause of action a diversity claim based upon the savings to suiters clause and that it is a maritime claim, which would make the maritime law applicable. The incident occurred on navigable waters and it's our position that the maritime law would apply.
>
> Accordingly, the *Provenza* and *Venable* cases which have been cited, along with the *Kernan* case, would require an instruction that a violation of the Coast Guard regulation would be negligence per se as opposed to being evidence of negligence and that if the jury were to find that as a proximate result of that violation, the Plaintiff was injured, then it is negligence in and of itself. That would be—

[2] It would have been no more satisfactory had the plaintiff's counsel merely said "land-based." Neither descriptive tag afforded an answer as to which was the proper instruction. Under "land-based," or under "maritime," law, whether activities of a defendant would constitue "negligence *per se*" or "evidence of negligence"

The very fact that of my colleagues three (Judge Russell, Judge Widener, and Judge Hall), together with our distinguished companion, Judge Haynsworth, whose recent acceptance of senior status rendered him ineligible to vote in the *en banc* rehearing, were convinced that, under maritime law, the facts of the present case called for an evidence of negligence instruction rather than an instruction of negligence *per se* demonstrates convincingly that the answer in no way depends on the irrelevance of classification of the law as maritime.

It is to be remembered that, prior to the 1972 amendments in the Longshoreman's and Harbor Workers' Compensation Act ("LHWCA") the true maritime negligence doctrine rarely had occasion to surface in situations like the one here confronting us because a plaintiff covered by LHWCA and suing the vessel on a third-party negligence basis was able to proceed on the liability-without-fault approach of unseaworthiness. Negligence for maritime law purposes was a rarity.

As it happens, though it is just as irrelevant looked at from the opposite side, the few cases which were decided under the maritime law of negligence made the standard of negligence one of evidence of negligence and not one of negligence *per se*. *Marshall* v. *Isthmian Lines, Inc.*, 334 F.2d 131, 136, 138 (5th Cir. 1964) (with respect to Coast Guard regulations, the Court ruled that noncompliance was not negligence *per se*. "But this determination that negligence *per se* does not here apply does not mean that the regulations have no relevance at all in a negligence

---

would depend on the particular circumstances and on aspects of the law of negligence as to which plaintiff's counsel cast no light whatsoever. He did not so much as allude to their existence.

action." The judge's advice to the jury "would include, as a minimum, a positive declaration that the regulations do prescribe a standard of care, and, since this is not a *per se* situation, the jury could take the standard of care into account in determining whether this Shipowner in these circumstances was guilty of negligence.").[3]

Marshall made it perfectly clear that the choice between the two negligence standards should be made on a case-by-case basis. *Id.* at 136:

> It is perfectly obvious, therefore, that we cannot, we do not, undertake to categorize any of the regulations other than this one on cotton bales (46 C.F.R. § 146.27-25(b)) as *per se* or non-*per se*.

Beyond blurting out the term "maritime" in circumstances where it afforded no enlightenment whatever, the plaintiff simply cited three cases. Two of them were third party negligence actions by persons covered by LHWCA instituted prior to 1972, i.e., when unseaworthiness was still an available grounds for recovery rendering negligence irrelevant. Chief Judge Winter himself in his dissenting panel opinion recognized the cases as "inapposite."

The third case cited, *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), did not concern a plaintiff like Duty,

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[3] To like effect is *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438, 445-46 (9th Cir. 1979) ("The designing of a 20-30 foot deck load of logs without adequate safeguards at the sides could well have been viewed as evidence of negligence under the *law* as it existed prior to 1972. . . . Here, the trial judge did not instruct that Mammoth was negligent as a matter of law in failing to comply with the regulation. He submitted the regulation to the jury, along with all other evidence, so that the members might determine whether Mammoth was guilty of negligence. This would be the proper course to follow under all of the pre-1972 cases on the subject."). (Emphasis in original.)

who first had recovered workmen's compensation under the LHWCA, and subsequently was reaching out for an additional recovery through a third party action against the owner of the vessel. Rather, it was brought by the widow of a seaman for whom no workmen's compensation remedy was provided by law. The only available recovery was for negligence. However, the negligence was not of the usual "land-based" variety. The Jones Act, 46 U.S.C. § 688,[4] had adopted by reference the Federal Employers' Liability Act ("FELA"). The FELA, in turn, operated in circumstances where there was no workmen's compensation to insure relief for job-related injuries irrespective of fault. To avoid the spectre of employees going altogether uncompensated, although they were the inevitable victims of the industrialization of society, the FELA has been, and, at the time of decision in *Kernan,* had been construed to the point where it was virtually equivalent to a workmen's compensation act setting minimal requirements of proof in order to establish "negligence" which would not have sufficed under otherwise generally applicable negligence standards. As the Supreme Court pointed out in *Kernan, supra,* 355 U.S. at 431-32:

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[4] Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

> The question for our decision is whether, *in the absence of any showing of negligence,* the Jones Act—which in terms incorporates the provisions of the FELA—permits recovery for the death of a seaman resulting from a violation of a statutory duty. We hold that it does.
>
> . . . Therefore, as industry and commerce became sufficiently strong to bear the burden, *the law,* the reflection of an evolving public policy, *came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the "human overhead" of doing business.* For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents.

(*Emphasis supplied.*)

Consequently, the Jones Act case of *Kernan* was altogether "inapposite," too, as authority for the situation in which someone had already recovered workmen's compensation under the LHWCA and was now seeking a third party separate, distinct, and additional negligence recovery, not under the Jones Act and the FELA, but rather on the theory of land-based negligence divorced from any maritime concept encrustations.

Therefore, no adequate grounds for the objection to the "evidence of negligence" instruction were given. Substantially, the "reasons" were no reasons at all. There are, of course, readily available sources, the *Restatement Torts, Second,* § 286, cited by Judge Winter in his panel dissent,

in particular, which could have been cited as adequate "grounds of his objection."

Federal Rule of Civil Procedure 51 precludes a party's assigning as error on appeal the giving or the failure to give an instruction unless he not only "objects thereto before the jury retires to consider its verdict," but also, in so objecting, states "distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis supplied.) With respect, the decision of the *en banc* majority obliterates from F. R. Civ. P. 51 the phrase "and the grounds of his objection." *See* authorities gathered in my panel opinion, 660 F.2d 933, 941-2 (4th Cir. 1981), Slip Op. 22 and 23, especially 9 Wright and Miller, *Federal Practice and Procedure*, § 2254: "A party may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal . . ."

The wisdom of the Rule's requirement that there be stated "the grounds of his objection" and the corresponding unwisdom in the majority's excusing the plaintiff here from the responsibility to state adequate grounds are made manifest by the circumstances in which the particular instruction came before the district court.

Counsel for the plaintiff had included in his complaint the language[5] which the Advisory Committee on the Federal Rules had adopted as the indicator that the plaintiff wanted not to pursue his case on a theory of diversity jurisdiction but rather on admiralty jurisdiction grounds (with the consequent avoidance of a jury trial).[6] Distin-

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[5] "This cause of action arises under the General Maritime Law of the United States as hereinafter more fully appears."

[6] *Harrison* v. *Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 986-87 (5th Cir. 1978):

guished counsel for the plaintiff's employer, the joint venture, Raymond-Kiewitt-Tidewater, who was interested in realizing under its lien on any recovery against the owner of the tender up to the amount of its LHWCA payment, obviously recognized the contradictory character of the plaintiff's pleading.[7]

Thus, the plaintiff had to fight off the onslaught which was actually of his own making against his right to a jury

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> For example, a longshoreman's claim for personal injuries . . . may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. *One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute. . . . The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not;* the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear. . . . Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim. (Emphasis added [by Court]).

[7] It is ironic that counsel for the employer should now, in the interest of furthering his client's position, seek to muster arguments to support the adequacy of the presentation by plaintiff's counsel, in light of what his firm argued below. Counsel for the employer qualifies in wisdom, if not in age, as a Nestor of the Baltimore admiralty bar.

His firm, having, in its Intervening Complaint, asserted that the claim was an admiralty or maritime claim, contended that the owner of the tender, having admitted the allegation, had pleaded itself out of any right to a trial by jury, F. R. Civ. P. 9(h) and 38(e) specifically so providing.

trial secured by diversity jurisdiction. *See Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). He ultimately succeeded, but undoubtedly did so only by virtue of emphasizing that "Judge, it's a diversity, not a maritime, theory on which I am proceeding." Having won that engagement, he contributed to the district judge's mind-set which led the judge to the wrong conclusion that, it being a diversity action, the negligence law of Maryland should apply. Yet that judicial error is especially excusable where the judge first observed counsel describe the proceeding in his complaint as "maritime" then cry out "My theory is diversity, not maritime." Suddenly he is confronted with the same counsel saying "My proceeding is maritime, not diversity."

Given those vacillations, it was incumbent on counsel for the plaintiff to state the *correct* grounds of his objection, namely, not simply that the law was derived from maritime sources, but rather what sources of land-based negligence (here the *Restatement of Torts, Second,* § 286) best outlined the reasons why a negligence *per se* instruction would be preferable to an evidence of negligence instruction in this particular maritime claim.

With respect, I see nothing in *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos,* 49 U.S.L.W. 4405 (April 21, 1981), which cuts away from the clearly established concept described in detail in the panel majority opinion that, while the law is maritime in character, the maker of maritime law, the Congress, has elected substantively to adopt land-based concepts of negligence divorced from concepts applicable for other purposes under the maritime law. *Scindia* recognizes that such is the case (n.14: ". . . the legislative history suggests that the shipowner's liability

is to be judged by land-based standards. . . ."; n.13: the Supreme Court quotes with no apparent disapproval the legislative history to the effect that "the purpose was to place the injured longshoreman [or harborworker] in the same position he would be if he were injured in non-maritime employment ashore" and that negligence of the shipowner could be proved only if it was shown "to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances"). *Scindia* merely reaches the obvious conclusion that, while the Restatement is a most estimable source, it is not invariably the correct or applicable one.[8] Sometimes other sources of the correct land-based concepts must be found. *Scindia* is an example.

The *en banc* majority decision reaches, in my humble judgment, far beyond the proper limits of the principle that serious errors in jury instructions may merit reversal and a new trial. For that extreme relief signals a consequent incremental burden for a system already at full strain. While the rules of "evidence of negligence" and "negligence *per se*" differ in some conceptual particulars, there is nevertheless a great degree of practical overlap. That is so much the case here that the reversal and grant

[8] Specifically, a land-based rule which also incorporates concepts of contributory negligence or of assumption of risk would not be satisfactory since those concepts have no part to play in third party actions under LHWCA, 33 U.S.C. § 905(b). Present in the *Restatement* rules considered in *Scindia* and, therefore, making them inappropriate in that particular case, those concepts of contributory negligence and assumption of the risk were totally uninvolved insofar as "negligence *per se*" and "evidence of negligence" were concerned. Thus reference to that respected source of land-based negligence, the *Restatement*, in the instant case would in no wise be precluded by anything said in *Scindia*.

of a new trial amount to allowing a delinquent plaintiff, who forfeited his right to a new trial through noncompliance with Rule 51, the benefit of a second shot because of the residual paper-thin sliver of light attributable to the fact that the eclipse of "negligence *per se*" by "evidence of negligence" is only 90% and not total.

In my view, with the adoption of the *en banc* opinion, the Court has sounded the death knell of the five words in F.R. Civ. P. 51: "and the grounds of his objection." It is for that reason that I respectfully dissent.

Order

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1540

WILLIAM H. DUTY, JR.,

Appellant,

and

RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS Co. and TIDEWATER CONSTRUCTION CORP., a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Intervening Plaintiffs,

versus

EAST COAST TENDER SERVICE, INC.,

Appellee.

No. 79-1541

WILLIAM H. DUTY, JR.,

Plaintiff,

and

RAYMOND INTERNATIONAL, INC. and PETER KIEWITT SONS Co. and TIDEWATER CONSTRUCTION CORP., a joint venture d/b/a RAYMOND-KIEWITT-TIDEWATER,

Appellants,

versus

EAST COAST TENDER SERVICE, INC.,

Appellee.

Order

Upon consideration of the petition for rehearing and suggestion for rehearing en banc, along with the response to the petition, and a poll having been taken on the suggestion for rehearing en banc,

IT IS ORDERED that a petition for rehearing en banc is GRANTED.

IT IS FURTHER ORDERED that the above cases will be argued at the June 1981 session.

Entered at the direction of Judge Winter.

For the Court

/s/ WILLIAM K. SLATE, II
Clerk

Notice of Judgment

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

September 1, 1981

To:

RICHARD N. HAMBLETON, Esq.
PAUL D. BEKMAN, Esq.
FRANCIS J. GORMAN, Esq.
GEORGE J. KOELZER, Esq.
GEORGE BEALL, Esq.

Judgment was entered in Case No. 79-1540, 79-1541 this date.

The Court's opinion is enclosed.

WILLIAM K. SLATE, II
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EAST COAST TENDER SERVICE, INC.,
Petitioner,

v.

WILLIAM H. DUTY, JR. AND RAYMOND INTERNATIONAL, INC.
AND PETER KIEWITT SONS COMPANY AND
TIDEWATER CONSTRUCTION CORPORATION,
A JOINT VENTURE D/B/A RAYMOND-KIEWITT-TIDEWATER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant a writ of certiorari where there is no conflict among the circuits that, in an action under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), the maritime standard of negligence *per se* should be applied to a violation of an applicable Coast Guard regulation?

2. Does there exist any "special" or "important" reason for this Court to clarify the degree of specificity required for compliance with Rule 51 of the Federal Rules of Civil Procedure, where the objection in this case fully complied with the established standards developed by the courts, and where no conflict or confusion among the circuits concerning these standards has arisen?

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No. 81-1140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EAST COAST TENDER SERVICE, INC.,
Petitioner,

v.

WILLIAM H. DUTY, JR. AND RAYMOND INTERNATIONAL, INC.
AND PETER KIEWITT SONS COMPANY AND
TIDEWATER CONSTRUCTION CORPORATION,
A JOINT VENTURE D/B/A RAYMOND-KIEWITT-TIDEWATER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES INVOLVED

Supreme Court Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another

federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writ of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

STATEMENT OF THE CASE

Respondent, William H. Duty, (hereinafter referred to as "Duty") was a marine construction carpenter foreman employed by Respondent, Raymond-Kiewitt-Tidewater (hereinafter referred to as "R-K-T"). R-K-T was a joint venture which was in charge of the construction of a liquified natural gas (LNG) facility located approximately one mile off the western shore of the State of Maryland in the Chesapeake Bay, near Cove Point, Maryland. The purpose of the construction of the LNG facility one mile offshore was to permit large ocean going vessels carrying LNG to off load the LNG away from populated areas, and in water deep enough so that the vessels carrying the LNG could be navigated without fear of running aground.

R-K-T as the contractor in charge of construction entered into a contract with Petitioner, East Coast Tender Service, Inc. (hereinafter sometimes referred to as "East Coast" and as "Petitioner"), a New Jersey corporation, to transport R-K-T work crews from the western shore to the job site located one mile offshore. R-K-T paid East Coast for this service and East Coast carried R-K-T's work crews for hire.

Numerous vessels were used by East Coast to transport R-K-T work crews to the job site one mile offshore including two crew boats, the M/V Chandeleur and M/V Vega. The M/V Chandeleur was a motor vessel, owned by East Coast, which was fifty-nine feet in length, forty-four gross tons, and powered by an eight hundred horsepower engine.

The M/V Chandeleur was a vessel subject to inspection by the U.S. Coast Guard. It was issued a Certificate of Inspection which required that if it was operated for up to twelve hours a day it must have a Coast Guard licensed ocean operator at its helm. This was evidenced by the Certificate of Inspection itself as well as a stipulation entered into between the parties.

The East Coast operation at Cove Point was under the control and responsibility of its superintendent, Frank Cassanari. Cassanari hired those individuals for East Coast who would operate its vessels, including the M/V Chandeleur. Cassanari also provided operators of the vessels when the regular operator was either on vacation, ill or otherwise not available to operate the vessel.

The regular operator of the M/V Chandeleur was Robert Jarvis, an individual who possessed a valid Coast Guard ocean operator's license. Also crewing the M/V Chandeleur was one Douglas Kohlhoff, a deckhand. Kohlhoff was hired by Cassanari as a deckhand. Cassanari knew Kohlhoff did

not possess a Coast Guard ocean operator's license. In fact, Kohlhoff did not even possess a license to operate a motor boat. When Robert Jarvis, the regular operator of the M/V Chandeleur, went on vacation the week of April 26, 1976, Cassanari, knowing that Kohlhoff did not have a Coast Guard ocean operator's license, nevertheless assigned him to work on the M/V Chandeleur as the operator of the vessel. East Coast, in its "Statement of the Case," asserts that Kohlhoff "had frequently been called upon to operate the vessel, in and out of the presence of the regularly licensed operator, Robert Jarvis." (Petition at 4) This assertion misstates the record and misleads this Court. Rather, the testimony at trial revealed that April 26, 1976, the date of the occurrence, was the *first time* Kohlhoff ever operated the vessel by himself.[1]

The R-K-T work crews were transported to the work site on April 26, 1976 in the early morning hours. Duty's crew was assigned to work on the center platform. In order to get to the actual working area, the work crew would disembark from the vessel onto a loading dock located parallel to the water approximately five feet above the water level. The crew would then climb a ladder to a platform located some 40 feet above sea level, where it would perform its assigned tasks. When the work for the day was concluded, the crew would retrace its steps back to the loading dock in order to go aboard the crew boat for return to shore.

On April 26, 1976, the crew arrived at the platform area and began its work in the early morning hours. As the morning wore on, the weather began to deteriorate. High

[1] The testimony was as follows:

"Question: But it (April 16, 1976) was the first time you had ever worked as the operator of a vessel?
"Answer: On my own?
"Question: On your own.
"Answer: Yes."

winds began hitting the platform and the seas became rough. The work crew, fearing for its safety and believing they might not be able to leave the platform safely, called East Coast to send a crew boat to retrieve them. East Coast sent the M/V Chandeleur to pick up the crew of which Duty was the foreman. At the helm of the M/V Chandeleur was the deckhand, Kohlhoff, who did not possess a Coast Guard vessel operator's license and who was operating the M/V Chandeleur for the first time. Despite the existence of high seas and high winds, Kohlhoff attempted to make a stern approach to the landing platform when proper and safe navigation and operating procedure would have demanded a port or starboard approach. When Kohlhoff reversed the M/V Chandeleur, the stern of the vessel went under the loading platform and the rough seas picked up the vessel causing it to strike and smash the wooden loading platform, partially destroying same and causing the vertical ladder which was attached to the platform to be separated from its fastenings. Duty was descending the vertical ladder in order to board the M/V Chandeleur at this time, and he was seriously injured when the M/V Chandeleur struck the platform.

Duty's employer, R-K-T, accepted coverage under the Longshoremen and Harbor Worker's Compensation Act (hereinafter referred to as "LHWCA") on the basis that Duty was engaged in maritime employment and paid him statutory benefits pursuant to said Act for which a lien is claimed in this case.

Suit was instituted by Duty against East Coast pursuant to the general maritime law and further based upon the diversity of citizenship between the parties. A jury trial was held before the Honorable Alexander Harvey II, United States District Judge, for the District of Maryland. At trial, counsel for Duty requested the court to instruct the jury that East Coast failed to comply with the

applicable United States Statutes and Coast Guard Regulations, 46 U.S.C. Sections 390(a)(b)(c) and 46 CFR Section 186.05, requiring, in part, that the M/V Chandeleur have at least one licensed operator aboard the vessel, and that under the applicable maritime standards, this violation constitutes negligence *per se*. The court refused Duty's requested instruction, and instead, advised the jury that under Maryland law, not federal maritime law, violation of a Coast Guard regulation may be evidence of negligence, but not negligence *per se*. In accordance with Rule 51 of the Federal Rules of Civil Procedure, (hereinafter referred to as "Rule 51") Duty excepted to the court's instruction. The jury rendered a verdict in favor of East Coast.

Duty filed an appeal with the United States Court of Appeals for the Fourth Circuit. A panel of the Fourth Circuit affirmed, 2-1, holding that there was noncompliance with Rule 51 and thus, the objection to the instruction was not properly preserved.

Application for rehearing *en banc* was granted and on September 1, 1981, the Court of Appeals issued its decision reversing the jury verdict. Contrary to East Coast's assertion at p.6 in its Petition, the *en banc* court was *not* sharply divided. Rather, as the *per curiam* opinion explained, of the nine judges who heard the case, six agreed that the trial judge's instruction was legally incorrect, and that the jury should have been instructed that the operation of a motor vessel without a licensed operator in violation of a Coast Guard regulation was negligence *per se*. Moreover, seven judges agreed that Duty's counsel complied with Rule 51 in his objection to the incorrect instruction; Judge Russell expressed no view on this issue; and only Judge Murnaghan was of the opinion that there was noncompliance with Rule 51.

East Coast has petitioned this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS THAT, IN AN ACTION UNDER THE LHWCA, THE MARITIME STANDARD OF NEGLIGENCE *PER SE* SHOULD BE APPLIED TO A VIOLATION OF AN APPLICABLE COAST GUARD REGULATION.

Rule 17 of the Supreme Court Rules provides, in part, as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. . . .
>
> "(a) *When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter*; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (emphasis added).

Petitioner, in urging this Court to issue a writ, unjustifiably states that the 1972 amendments to the LHWCA have caused such confusion and uncertainty regarding the appropriate negligence standard to be applied where there has been a violation of an applicable Coast Guard regulation, that a "split of authority" has resulted (Petition at 7). This contention is not accurate; but even if it were true, it would not meet the requirements of Rule 17. As the discussion below reveals, the courts have consistently held that the 1972 Amendments preserved a longshoreman's cause of action for negligence and that the

established uniform federal maritime standards continue to be applicable to this cause of action. Moreover, under these established maritime standards, it has been uniformly held that violation of a Coast Guard regulation constitutes negligence *per se*. A full and careful reading of the authority cited by Petitioner further establishes that, despite Petitioner's assertions to the contrary, these are the proper principles to be applied in both pre and post-1972 LHWCA cases, and there is no conflict among the circuits.

A. *The 1972 Amendments to the LHWCA Did Not Alter A Longshoreman's Cause of Action for Negligence.*

It has been firmly established for more than sixty years that a longshoreman has a maritime cause of action for negligence, *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914), and that "rules of maritime law displace rules of common law in actions brought under the saving to suitors clause in non-admiralty courts." Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975) at 456 *citing Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917). In the 1946 *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) decision, this Court gave longshoremen an *additional* maritime cause of action for unseaworthiness. The negligence cause of action remained in effect.

In 1972, Congress amended the LHWCA by abolishing a longshoreman's action against a ship on the theory of unseaworthiness, thus effectively overruling *Sieracki*. The longshoreman's well-established maritime cause of action for negligence, however, was "expressly preserved." *Edmonds v. Compagnie Generale Transatlantique*, 557 F.2d 1153, 1155 (4th Cir. 1978) (*en banc*), *reversed on other grounds* 443 U.S. 256 (1979). Therefore, as in cases prior to the 1972 amendments, this negligence action was to be administered on the basis of uniform federal law, and that uniform law was to be maritime in nature. *See* [1972] U.S.

Code Cong. and Adm. News 4698, 4705; *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933 (Winter, J. Dissenting) (4th Cir. 1981), *reversed* 660 F.2d 946 (4th Cir. 1981) (*en banc*) (Winter dissent adopted).

Petitioner concedes that a *uniform federal* law is to be applied to longshoremen post-1972 negligence actions. (Petition at 7-8). Nevertheless, relying on this Court's recent decision in *Scindia Steam Navigation Co. v. De Los Santos*, ___ U.S. ___, 68 L. Ed. 2d 1, 101 S. Ct. 1614 (1981), Petitioner contends that Congress, in enacting the 1972 amendments, somehow scrapped the *traditional* maritime negligence cause of action and replaced it with a *newly created* general federal maritime tort action (Petition at 7-8). Moreover, under this alleged "new" federal cause of action, Petitioner asserts that land-based tort principles, rather than established maritime doctrines, apply. Both Petitioner's contentions and its reliance on *Scindia* are completely misplaced and incorrect.

A complete and careful reading of this Court's *Scindia* decision reveals that, contrary to Petitioner's assertions, that case laid to rest *any doubt* that all that the 1972 amendments did to an injured longshoreman's action for negligence, was *preserve* his rights under the prior maritime law, and did not create a new common law cause of action. This Court, at ___ U.S. ___, 101 S. Ct. at 1621, specifically stated that:

> "the longshoreman's right to recover for unseaworthiness was abolished; his right to recover from the shipowner for negligence was *preserved* in Sec. 905(b) . . ." (emphasis added).

Petitioner, in its analysis of the *Scindia* opinion, totally ignores the import of the word "preserved." Moreover, in its contention that land-based principles apply to a negligence cause of action, Petitioner confuses and distorts the legislative history by inaccurately paraphrasing this

Court's statement at footnote 13. Petitioner asserts that *"the purpose of the amendments* was to place the injured longshoreman 'in the same position he would be if he were injured in non-maritime employment ashore . . . and not to endow him with any special maritime theory of liability . . .'" (Petition at 7) (emphasis added). This statement is both incorrect and misleading. This Court actually stated at Footnote 13 that "Section 905(b) itself negates the vessels' liability for *unseaworthiness*, and the committee reports state that the purpose of eliminating *this [unseaworthiness] remedy* was to place the injured longshoreman 'in the same position he would be if he were injured in non-maritime employment ashore . . .'" (emphasis added). There is no question that the purpose of the 1972 amendments was to eliminate the unique maritime cause of action for "unseaworthiness" and to limit an injured longshoreman's rights against a shipowner to a single cause of action for negligence, just as those injured in non-maritime employment ashore have a single cause of action for negligence.[2] However, the Court at footnote 13 and elsewhere in its *Scindia* opinion, goes on to indicate that a longshoreman's negligence action would be administered as it had been prior to the amendments, It would not follow established land-based principles such as invitee-licensee rules (*See Scindia* at n.10), or assumption of

[2] The origin and intent of this "land-based" language can be traced to the Senate and House Hearings. The subject arose in connection with the recommendations of several witnesses, including the Secretary of Labor, that the law prohibit *all* third party actions against vessels. Senator Javits then wanted to know why longshoremen should not have the same right to sue a third party for negligence as would a construction worker ashore. Hearings before Subcommittee on Labor, 92nd Cong., 2d Sess. on S. 2318, S. 525 and S. 1547 (1972) at 38. Later, the Minority Counsel, picked up this theme and referred to it repeatedly. (Subcommittee Hearings at 72-73, 272-274, 655-656). He summarizes his position in one final sentence: "We could leave the vessel in the same position as land-based third parties." Subcommittee Hearings at 656.

risk principles. (n.13) Rather, the longshoreman's action, "as in other *admiralty* cases," *Scindia* at n.13 (emphasis added), would be governed by established *maritime* standards (i.e. comparative negligence (n.13), "reasonable care under the circumstances test" (n.10)).

Moreover, in *Scindia* this Court had the opportunity to adopt and/or recognize a uniform federal common law applicable to § 905(b) actions and to further adopt and/or recognize the shipowner's contention that the land-based Restatement of Torts, Sections 343 and 343A, applied to such claims. In refusing to do so, this Court, relying on *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), a pre-1972 amendment case, stated the following:

> "the legislative history does not refer to the Restatement and also states that land-based principles of assumption of risk and contributory negligence are not to be applied in § 905(b) cases. *This strongly suggests, as Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), indicated, that maritime negligence actions are not necessarily to be governed by principles applicable in non-maritime contexts.* Furthermore, since the lower courts are not only in disagreement as to the applicability of §§ 343 and 343A [of the Restatement] but also as to their import and meaning *when applied in the maritime context* those sections, while not irrelevant, do not furnish sure guidance in cases such as this." ___ U.S. ___, 101 S. Ct. 1622 n.14 (emphasis added).

Additionally, in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), this Court also was confronted with determining the effect of the 1972 amendments on an injured longshoreman's action against a shipowner for alleged negligence. After analyzing the pre-1972 amendment cases and the congressional reports studying these amendments, the Court explained that "[t]he legislative history strongly counsels against . . .

(an) interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel." 443 U.S. at 266. This Court further observed that:

> "In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law *that it chose not to change.*" 443 U.S. at 272. (emphasis added)

Accordingly, the Court concluded that under the 1972 amendments Congress did not intend to change the long-established and judicially created principle of maritime law that the shipowner can be made to pay all damages not due to the plaintiff's own negligence by imposing a proportionate fault rule; thus, in post-1972 cases, the shipowner may still be held liable for this entire amount. *See also Russell v. Atlantic and Gulf Stevedores*, 625 F.2d 71, 72 (5th Cir. 1980) ("Established principles require the rejection of . . . [plaintiff's] contention that Section 905(b) creates a new cause of action governed by the rules of civil procedure rather than those prevailing in admiralty"); *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113, 117 (5th Cir. 1976), *cert. denied* 430 U.S. 906.

The above discussion indicates that, on the two separate occasions in which this Court has reviewed the 1972 amendments to the LHWCA, it has clearly and unequivocally held that a longshoreman's cause of action for negligence against a shipowner has been preserved and that established maritime rules continue to apply to such actions. Petitioner has failed to point to any conflict among the circuits in applying this doctrine. Accordingly, given that this issue has been finally resolved by this Court and Petitioner has failed to demonstrate the need for a third review, a writ of certiorari should not issue.

B. *Under Established Maritime Standards, the Courts Have Uniformly Held that a Violation of an Applicable Coast Guard Regulation Constitutes Negligence Per Se.*

Petitioner characterizes the *en banc* court below as being "sharply divided" on the issue of whether negligence *per se* or evidence of negligence was the proper standard to be applied to the violation of the Coast Guard regulation in this case (Petition at 8-9). A tally of the judges' votes, however, fails to support this characterization. As noted above, of the nine judges who decided this case, six agreed with Duty that negligence *per se* was the proper standard, while only three judges were of the opinion that the test should be evidence of negligence. Rather than revealing a sharp split on this issue in the Fourth Circuit, the lower court's decision effectively establishes that a clear and substantial majority of judges on that court concur that the proper standard is negligence *per se*.

The *en banc* court's decision in this case is entirely consistent with the established maritime case law developed both prior to and subsequent to the 1972 amendments. Those cases uniformly hold that the violation of a statute or regulation which is intended to protect the class of persons to which plaintiff belongs against the risk of harm which has in fact occurred is negligence *per se*. *See Kernan v. American Dredging Company*, 355 U.S. 426 (1958); *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), *cert. denied* 376 U.S. 952 (1964); *Rowe v. Brooks*, 329 F.2d 35 (4th Cir. 1964); *Venable v. Det Forenede Dampskibsselskab*, 399 F.2d 347 (4th Cir. 1968); *Grigsby v. Coastal Marine Serv. of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969); *Arthur v. Flota Mercante Gran Centro Americana, S.A.*, 487 F.2d 561 (5th Cir. 1973); *Lacaze v. Olendorff*, 526 F.2d 1213 (5th Cir. 1976); *Manning v. Diamond Services Corporation*, 541 F.2d 279 (5th Cir. 1976); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706

(5th Cir. 1981); *Brinegar v. San Ore Construction Company, Inc.*, 302 F. Supp. 630 (E.D. Ark. 1969). Moreover, in *Reyes v. Vantage Steamship Co., Inc.*, 609 F.2d 140 (5th Cir. 1980), the Fifth Circuit, citing *Kernan*, stated that the "failure to follow *any* Coast Guard regulation which is a cause in an injury establishes negligence *per se*." 609 F.2d at 143 (emphasis in original).

It is significant that Petitioner has failed to cite any maritime case which adopts a standard other than negligence *per se* to support its contention that evidence of negligence is the proper test to apply to the facts of this case. Instead, Petitioner presents a sketchy review of *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1969) and *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981), in an effort to lead this Court to believe that those cases establish an evidence of negligence standard. However, a *full* review of the Fifth Circuit's analysis in *Marshall* and *Melerine* further demonstrates that they are consistent with the developed holding that negligence *per se* is the proper standard to be applied to the facts of this case.

In both *Marshall* and *Melerine* the court stated the well established maritime rule that violation of a statute or regulation constitues negligence *per se*. Inherent in this legal principle, the court further explained, are three essential questions which must be resolved before liability could be imposed on a negligence *per se* theory:

1. What proof makes out a violation of the regulations?

2. Were the regulations designed to protect the Plaintiff?

3. Were the regulations intended to protect against the kind of harm that occurred here?

Marshall, 334 F.2d at 134; *Melerine*, 659 F.2d at 709-710.

In *Melerine*, the court concluded that the second prong of this test was not met because the regulations under scrutiny (Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 regulations) were not designed to protect that plaintiff.[3] Similarly, the *Marshall* court found that the regulation involved therein was not designed to protect against the risk of harm incurred, thus failing to meet the third criterion. However, the Fifth Circuit, in each of those cases, explicitly stated that if all of the factors of this test had been met, the negligence *per se* standard would have been imposed.

This three-prong test enunciated by the court in *Marshall* and Melerine, is consistent with and has been utilized in each of the maritime cases where a negligence *per se* standard has been adopted. *See, e.g. Reyes v. Vantage Steamship Co. Inc.*, 558 F.2d 238 (5th Cir. 1977); *Arthur v. Flota Mercante Gran Centro Americana, S.A.*, 487 F.2d 561 (5th Cir. 1977); *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 946 (1981). Accordingly, there is absolutely no confusion or conflict among the courts as to what the proper negligence standard is for a violation of an applicable regulation and what prerequisites must be met before the negligence *per se* standard is to be applied to the facts of a specific case.

Finally, Petitioner contends that licensing regulations are excluded from the negligence *per se* standard. (Petition at 10-12). This contention is totally without merit. Initially, the Court should note that Petitioner places total reliance for this contention on non-federal and non-maritime, land-based tort law which varies from jurisdic-

[3] The court held that OSHA regulations were designed to protect *only* employees of the shipowner employer. Since the plaintiff longshoreman was not the shipowner's employee, the OSHA regulations did not protect him.

tion to jurisdiction. As explained above at 8-12, *supra*, such land-based cases and principles are completely inapplicable and must not be considered in the resolution of maritime issues. Rather, in determining whether the negligence *per se* standard would be properly applied in a licensing regulation case, the courts are simply to apply the three-prong *Marshall* test to the specific facts presented, just as it would in any other case involving the violation of an applicable regulation.

Petitioner asserts that the *en banc* court below failed to apply this test, but merely reached "the conclusion that negligence *per se* should apply here without analyzing whether the licensing regulation involved was intended to protect someone such as Duty from the type of injury which he claims occurred." (Petition at 11). This assertion is both an incorrect and unfair analysis of the lower court's opinion.

In its *per curiam* opinion, the *en banc* court stated:

> "As to the substantive issue, Chief Judge Winter, Judge Butzner, Judge Phillips, Judge Murnaghan, Judge Sprouse and Judge Ervin agree that, *for the reasons set forth in Judge Winter's dissenting panel opinion,* the instruction given was legally incorrect. The jury should have been instructed that the operation of the motor vessel without a licensed operator in violation of a regulation of the Coast Guard was negligence *per se*. . . ." (Petition Appendix at 34a) (emphasis added).

A review of Judge Winter's dissenting panel opinion, which was adopted by the *en banc* court, reveals that the three-prong test was applied to the specific facts involved herein. In that opinion Judge Winter stated:

"Plaintiff here was within the protected class of persons,[4] and the license requirement was designed to

[4] The legislative history and court interpretations of the statute and regulations in question clearly establish that Duty is within the class sought to be protected. The licensing requirement for operators of vessels contained in 46 CFR 186.05-1 was promulgated pursuant to the authority vested in the Coast Guard by 46 U.S.C. 390(b). By its express terms the purpose of this law was to require that certain vessels which carry more than six passengers for hire shall be subject to inspection and certification by the U.S. Coast Guard in the interest of safety. [1956] U.S. Code Cong. & Adm. News 2527. As the legislative history recites at p. 2528-2529:

> "Subsequent to the preparation of the legislation, the tragic foundering of the sailing vessel *Levin J. Marvel* in the Chesapeake Bay in August 1955 pointed up the need for requiring inspection and certification of other types of passenger-carrying vessels, such as sailboats and barges. H.R. 8267, introduced by Mr. Lankford, of Maryland, was designed to accomplish this.
>
> The *Levin J. Marvel* was a wooden sail vessel of 183 gross tons, built in 1891 at Bethel, Del. In recent years the vessel was used in carrying passengers for hire on pleasure voyages in the Chesapeake Bay area. Existing law and regulations did not require inspection of such sailing vessels of less than 700 gross tons. *None of the crew had any certificates of competency from the Coast Guard, nor were they required to have such certificates under the law. This vessel would not have been permitted to operate in the service in which she was engaged if she had been subject to Coast Guard inspection.*" (emphasis added)

Subsequent to the enactment of this legislation the Supreme Court had the opportunity to review the purpose and intent of these Coast Guard regulations. In *Huron Portland Cement Company v. City of Detroit, Michigan*, 362 U.S. 440 (1960), the Supreme Court held at p. 445:

> "As is apparent on the face of the legislation, however, the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection. Thus 46 U.S.C. § 392(c), 46 U.S.C.A. § 392(c), makes clear that inspection of boilers and related equipment is for the purpose of seeing to it that the equipment "may be safely employed in the service proposed." *The safety of passengers, of the crew,* 46 U.S.C. § 391(b), 46 U.S.C.A. § 391(b), *is the criterion.* The thrust of the federal inspection laws is clearly limited to affording protection from the *perils of*

> protect the particular interest invaded against the very harm inflicted." (Petition Appendix at 24a).

Therefore, contrary to Petitioner's contention, the Fourth Circuit did conclude that the present case fully satisfied the established test.

Accordingly, as the discussion above fully indicates, the only question ever really presented herein is whether the facts involved in this particular case actually meet the three criteria enunciated in *Marshall*. Surely such an analysis is inherent in every maritime claim where it is contended that an applicable regulation has been violated. However, there exist no "special and important reasons" (Supreme Court Rule 17), and Petitioner has failed to articulate any such reasons, why this Court should grant a writ simply to resolve that issue in this case, particularly where no confusion or conflict among the circuits has arisen over how to apply this test. The petition, therefore, should be denied.

II.

THERE DOES NOT EXIST ANY "SPECIAL" OR "IMPORTANT" REASON FOR THIS COURT TO CLARIFY THE DEGREE OF SPECIFICITY REQUIRED FOR COMPLIANCE WITH RULE 51, WHERE THE OBJECTION IN THIS CASE FULLY COMPLIED WITH THE ESTABLISHED STANDARDS DEVELOPED BY THE COURTS, AND WHERE NO CONFLICT OR CONFUSION AMONG THE CIRCUITS CONCERNING THESE STANDARDS HAS ARISEN.

At trial, counsel for Duty requested the court to instruct the jury that the fact with Kohlhoff was not a licensed operator violated a Coast Guard regulation and, therefore, under maritime law constituted negligence *per se*. The court refused to give this instruction, and instead, charged

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> *maritime navigation. Cf. Ace Waterways v. Fleming, D.C.*, 98 F. Supp. 666. *See also Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805." (emphasis added).

Duty, a prospective *passenger* for hire about to be picked up by the M/V Chandeleur on navigable waters of the U.S., fits clearly within that class who seeks ". . . protection from the perils of maritime navigation."

the jury in accordance with Maryland law — that violation of a regulation was, at most, evidence of negligence. Duty excepted to the court's failure to give his requested instruction, explaining that although he was suing under diversity jurisdiction based upon the saving to suitors clause, his claim was maritime and, therefore, federal maritime law was applicable. Moreover, under the established maritime law, Duty's counsel explained to the trial judge that a violation of a Coast Guard regulation would be negligence *per se*, not evidence of negligence, citing *Kernan v. American Dredging Company*, 335 U.S. 426 (1958), *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), *cert. denied* 376 U.S. 952 (1964), and *Venable v. A/S Det Forenede Dampskibsselskab*, 399 F.2d 347 (4th Cir. 1968). *See* Petition at 13-14 for the text of Duty's objection.

Relying almost entirely on Judge Murnaghan's *reversed* majority panel opinion and his *en banc* dissent below, Petitioner alleges that Duty's objection failed to fully comply with Rule 51 of the Federal Rules of Civil Procedure. However, unable to find any disagreement by any of the circuits with the standard for compliance applied by the *en banc* court, Petitioner, in obvious attempt to grasp at straws, asserts that "[t]he *division* within the Fourth Circuit Court of Appeals alone as to the requisite degree of specificity to comply with Rule 51 reveals the need for clarification by this Court." (Petition at 13) (emphasis added). As both this alleged "division" in the Fourth Circuit and the case law discussed below reveal, there is absolutely no need for this Court to further clarify Rule 51.

Initially, it must be emphasized that there is no "division" within the Fourth Circuit as to the degree of specificity needed to comply with Rule 51. Only *one* judge, out of the eight judges who decided this issue (as noted above, Judge Russell expressed no view on this issue),

disagreed with the standard enunciated by the *en banc* court. Judge Murnaghan's opinion, therefore, is better characterized as a "lone dissent," rather than a "division within the circuit." Surely a writ of certiorari should not issue merely because one judge dissents from an *en banc* decision. Rule 17 requires that much more compelling reasons be advanced.

Furthermore, the lower court's holding that there was compliance with Rule 51, is completely consistent with the standard adopted by the other circuits. Significantly, it was the "lone dissenter" Judge Murnaghan, not the other seven judges, who expressed a standard in conflict with other decisions of the Fourth Circuit, as well as the other federal appellate courts. The circuits have uniformly held that a three-pronged standard must be satisifed for there to be compliance with Rule 51. In accordance with this test: (1) there must be an objection to the disputed instruction; (2) counsel must state distinctly the matter to which he objects; and (3) the grounds for the objection must be articulated. *See, e.g. Buckley v. Valley Camp Coal Company,* 324 F.2d 244 (4th Cir. 1963); *Altvater v. Battocletti,* 300 F.2d 156 (4th Cir. 1962); *Taylor v. Denver and Rio Grande Western Railroad Company,* 438 F.2d 351 (10th Cir. 1971); *Pierro v. Carnegie-Illinois Steel Corporation,* 186 F.2d 75 (3rd Cir. 1950); *Thomas v. Union Railway Company,* 216 F.2d 18 (6th Cir. 1954). The purpose of Rule 51, these cases explain, is to require counsel to inform the trial judge of an erroneous instruction and what the correct instruction should be. There can be no dispute that Duty fully complied with this standard.

Petitioner, nevertheless, seeks to have this Court impose a fourth and improper requirement to Rule 51 — that trial counsel state with exactitude and precision the *legal theory* which underlies the grounds for the objection. (Petition at 14). Such a requirement is totally unrealistic and unfair, and as the cases cited above demonstrate, no

such additional requisite exists. Moreover, Petitioner is unable to point to any case where Rule 51 has been applied so strictly as to require trial counsel, as a prerequisite to compliance, to state the theory of his objection with the precision demanded by Petitioner.[5] *Palmer v. Hoffman* 318 U.S. 109 (1943), the only case cited by Petitioner to support its contention that the charge be so specific as to state the precise legal theory, is inapposite. That case did not involve any alleged "faulty" theory of law which was advanced as the basis of the exception. Rather, in *Palmer,* a general objection was found to be insufficient because counsel failed to identify specifically the particular portion of the instruction to which he objected.

Finally, the federal court decisions discussing the standard for compliance under Rule 51 counsel against a strict application of this rule. The Tenth Circuit, in *Darter v. Greiner,* 301 F.2d 772 (10th Cir. 1962), stated:

> "A formal objection need not include detail of supporting argument in order to fully apprise the court of the

[5] Petitioner contends that Duty's explanation that this matter was maritime and that the established maritime standard established in *Kernan, Provenza* and *Venable,* is negligence *per se* was insufficient. Referring to its contention in Argument I of its Petition, Petitioner asserts that to comply with Rule 51, Duty was required to advise the trial judge that land-based principles apply to post-1972 amendment cases and that the land-based standard is negligence *per se.* (Petition at 14). However, under the established standard, as described above, such particularity is *not* required.

Moreover, for the reasons stated above at 8-12, *supra,* the theory advanced by Petitioner in its so-called properly worded objection is legally incorrect, for maritime, not land-based, law applies to this action. Accordingly, as Judge Winter noted in his dissenting opinion to the panel decision which was adopted by the *en banc* court, the reasons and legal theory articulated by Duty in his objection — that this was a maritime case, that federal maritime, not Maryland, law was applicable and that the *Kernan* case established the federal maritime standard — were "completely correct." (Petition Appendix at 27a)

> grounds of the objection. And it is *perfectly proper* for counsel, as was done here, to suggest the proper form of instruction while reserving objection to the submission of the subject matter of the instruction." 301 F.2d at 775 (emphasis added).

The Third Circuit, in *Green v. Reading Company*, 183 F.2d 716 (3rd Cir. 1950), emphasized):

> "'[T]here is no good reason for applying [Rule 51] so indiscriminately as to prevent counsel from pointing out on appeal matter [sic] which he did endeavor to identify to the trial court and which he had every reason for granting an exception.'" 183 F.2d at 719.

The Sixth Circuit, in *Thomas v. Union Railway Company*, 216 F.2d 18 (6th Cir. 1954), explained:

> "Even where an exception to a charge is not technically sufficient, nevertheless, when its purport is unmistakable in challenging the attention of the trial court to the claimed error and to appellant's right to a clear instruction on a subject which is of importance to his case, it is held by a reviewing court to be definite enough to point out the commission from the charge; and such an exception is sufficient." 216 F.2d at 20.

See also 5A Moore, *Federal Practices*, Sec. 51.04.

The degree of specificity needed to comply, in full, with Rule 51 is clear and unambiguous. The three-prong standard described above has been uniformly adopted and applied by each circuit court confronted with this issue. The *en banc* court below properly followed this approach. In contrast, it is Petitioner who articulates a standard which is inconsistent with and which is a radical and unprecedented departure from this established application of Rule 51. Except for the lone dissenter on the *en banc* court, Petitioner is unable to find any support for the standard it advances. Accordingly, Petitioner has failed to assert any "special" or "important" reason to justify any

need for this Court to clarify the standards for compliance under Rule 51. A writ of certiorari, therefore, should not issue.

CONCLUSION

For all of the aforegoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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